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WILSON & LAFLEUR

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Principal Abbreviations

AA	Vatican II, Decree on the Apostolate of Lay People, *Apostolicam actuositatem*, November 18, 1965, *AAS* 59 (1966) 837–864
AAS	*Acta Apostolicae Sedis: commentarium officiale*
AG	Vatican II, Decree on the Church's Missionary Activity, *Ad gentes*, December 7, 1965, *AAS* 58 (1966) 947–990
AIE	Sacred Congregation for Religious and Secular Institutes, Decree *Ad instituenda experimenta*, June 4, 1970, *AAS* 62 (1970) 549–550
AkK	*Archiv für katholisches Kirchenrecht*, Mainz, 1857–
Alloc.	Allocution
AP	Apostolic Penitentiary
AP	Paul VI, motu propio *Ad pascendum*, August 15, 1972, *AAS* 64 (1972) 534–540
Ap.	Apostolic
Ap. Const.	Apostolic Constitution
Ap. Exhort.	Apostolic Exhortation
art. / arts.	article / articles
AS	Paul VI, motu proprio *Apostolica sollicitudo*, September 15, 1965, *AAS* 57 (1965) 775–780
BB	*Benedicti Papae XIV Bullarium*, Venice 1768
Bk.	Book
BM	*Bibliographia missionaria*
BOCEE	*Boletín Oficial de la Conferencia Episcopal española*
BOEE	*Boletín Oficial del Estado español*
BRC	*Bullarii Romani Continuatio, Romae 1835–1855*
C	*Causa (Decreti pars secunda)*
c. / cc.	canon / canons
CA	Pius XII, motu proprio *Crebrae allatae*, February 22, 1949, *AAS* 31 (1949) 89–117
CAd	Secretariat of State, Rescript *Cum admotae*, November 6, 1964, *AAS* 59 (1967) 374–378

CAn	JOHN PAUL II, Encyclical *Centesimus annus*, May 1, 1991, *AAS* 83 (1991) 793–867
CB	Congregation for bishops
CBA	Conference of bishops of Argentina
CBF	Conference of bishops of France
CBI	Conference of bishops of Italy
CBM	Conference of bishops of Mexico
CBP	Conference of bishops of Portugal
CBS	Conference of bishops of Spain
CC	Congregation for the Clergy
CC	PIUS XI, Encyclical *Casti connubii*, December 31, 1930, *AAS* 22 (1930) 539–592
CCC	*Catechism of the Catholic Church*, Canadian Conference of Catholic bishops, Ottawa, 2000
CCCL	Central Commission for the Coordination of the Work of the Council and for Interpreting the Conciliar Decrees
CCE	Congregation for Catholic Education
CCEO	*Codex canonum Ecclesiarum orientalium*, 1990
CCh	*Corpus Christianorum*: SL (Series Latina), SG (Series Graeca). Turnhout-Paris 1953 ss.
CCS	Congregation for the Causes of Saints
CD	VATICAN II, Decree on the Pastoral Office of bishops in the Church, *Christus Dominus*, October 28, 1965, *AAS* 58 (1966) 673–696
CDF	Congregation for the Doctrine of the Faith
CDRC	Commission for the Discipline of the Roman Curia
CDWDS	Congregation for Divine Worship and the Discipline of the Sacraments
CE	PAUL VI, motu proprio *Catholica Ecclesia*, October 23, 1976, *AAS* 68 (1976) 694–696
CEC	Congregation for the Eastern Churches
CEP	Congregation for the Evangelization of Peoples
cf.	confer
ch.	chapter
CIC	*Codex iuris canonici*, 1983
CIC/1917	*Codex iuris canonici*, 1917
CICLSAL	Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
CICSL	Consilium for the Implementation of the Constitution on the Sacred Liturgy
CL	JOHN PAUL II, Apostolic Exhortation *Christifideles laici*, December 30, 1988, *AAS* 81 (1989) 393–521
Clem.	*Clementinae*

CM	PAUL VI, motu proprio *Causas matrimoniales*, March 28, 1971, *AAS* 63 (1971) 441–446
CMat	PAUL VI, motu proprio *Cum matrimonialium*, September 8, 1973, *AAS* 65 (1973) 577–581
CodCom	Pontifical Commission for the Authentic Interpretation of the Canons of the Code of Canon Law
col. / cols.	column / columns
Collectanea	*Collectanea S. Congregationis de Propaganda Fide*, Romae 1907
Comm	Communicationes
Communionis notio	CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Letters to the bishops of the Catholic Church about Certain Aspects of the Church as Communion*, May 28, 1992, *AAS* 85 (1993) 838–850
Comp. I (II ...)	*Compilatio prima* (*secunda*, etc.)
Congr.	Congregation
Const.	Constitution
CPAC	Council for the Public Affairs of the Church
CS	PAUL VI, motu proprio *Cleri sanctitati*, June 2, 1957, *AAS* 49 (1957) 433–600
CSan	SACRED CONGREGATION FOR RELIGIOUS, Instruction *Cum Sanctissimus*, March 19, 1948, *AAS* 40 (1948) 293–297
CSEL	*Corpus scriptorum ecclesiasticorum latinorum*, Viena 1866 ss.
CT	JOHN PAUL II, Apostolic Exhortation *Catechesi tradendae*, October 16, 1979, *AAS* 71 (1979) 1277–1340
D.	*Distinctio (Decreti pars prima; De poen.; De cons.)*
DCV	*Documenta inde a Concilio Vaticano II expleto edita* (1966–1985), Vatican City 1985
De poen.	*Tractatus de poenitentia* (C. 33, q. 3)
De cons.	*De consecratione (Decreti pars tertia)*
DE	*Il Diritto ecclesiastico*
DE/1967	SECRETARIAT FOR PROMOTING CHRISTIAN UNITY, *Ecumenical Directory*, I: May 14, 1967, *AAS* 59 (1967) 574–592; II: April 16, 1970, *AAS* 62 (1970) 705–724
DE/1993	PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY, *Directory for the Application of the Principles and Norms on Ecumenism*, March 23, 1993, *AAS* 85 (1993) 1039–1119
Decl.	Declaration
Decr.	Decree
DH	VATICAN II, Declaration on Religious Liberty, *Dignitatis humanae*, December 7, 1965, *AAS* 58 (1966) 929–946
DI	*Dilexit iustitiam*, Vatican City 1984
dict. p. c.	Dictum Gratiani post capitulum
Dir.	Directory

DPM	JOHN PAUL II, Apostolic Constitution *Divinus perfectionis Magister*, January 25, 1983, *AAS* 75 (1983) 349–355
DPMB	SACRED CONGREGATION FOR BISHOPS, *Directory on the Pastoral Ministry of bishops* (*Ecclesiae imago*), February 22, 1973, Typis polyglottis Vaticanis 1973
DR	PIUS XI, Encyclical *Divini Redemptoris*, March 19, 1937, *AAS* 29 (1937) 65–106
DSD	PIUS XI, Apostolic Constitution *Deus scientiarum Dominus*, May 24, 1931, *AAS* 23 (1931) 241–262
DV	VATICAN II, Dogmatic Constitution on Divine Revelation, *Dei Verbum*, November 18, 1965, *AAS* 58 (1966) 817–835
Dz.-Sch	DENZINGER-SCHÖNMETZER, *Enchiridion Symbolorum, Definitionum et Declarationum de rebus fidei et morum*, ed. 33.ª, 1965
EcS	PAUL VI, Encyclical *Ecclesiam Suam*, August 6, 1964, *AAS* 56 (1964) 609–659
EDIL	*Enchiridion Documentorum Instaurationis Liturgicae* (R. Kaczynski, ed.), Torino-Roma 1976–1993
EFH	*Enchiridion fontium historiae ecclesiasticae antiquae* (C. Kirch, ed.)
EIC	Ephemerides iuris canonici
EM	PAUL VI, motu proprio *De Episcoporum muneribus*, June 15, 1966, *AAS* 58 (1966) 467–472
EMys	SACRED CONGREGATION FOR RITES, Instruction *Eucharisticum mysterium*, May 25, 1967, *AAS* 59 (1967) 539–573
EN	PAUL VI, Apostolic Exhortation *Evangelii nuntiandi*, December 8, 1975, *AAS* 68 (1976) 5–76
Enc.	Encyclical
EP	SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Decree *Ecclesiae Pastorum*, March 19, 1975, *AAS* 67 (1975) 281–284
ES	PAUL VI, motu proprio *Ecclesiae sanctae*, August 6, 1966, *AAS* 58 (1966) 757–787
ET	PAUL VI, Apostolic Exhortation *Evangelica testificatio*, June 29, 1971, *AAS* 63 (1971) 497–526
EV	*Enchiridion Vaticanum.* Edizioni Dehoniane, Bologna 1966–2001
Exhort.	Exhortation
Extrav. com.	*Extravagantes communes*
Extrav. Io. XXII	*Extravagantes Ioannis XXII*
FC	JOHN PAUL II, Apostolic Exhortation *Familiaris consortio*, November 22, 1981, *AAS* 74 (1982) 81–191
ff	following
Fontes	P. GASPARRI AND A. SERÉDI, eds., *Codicis Iuris Canonici Fontes*, Rome 1923–1939

GCD	SACRED CONGREGATION FOR CLERGY, *General Catechetical Directory*, April 11, 1971, *AAS* 64 (1972) 97–176
GE	VATICAN II, Declaration on Christian Education, *Gravissimum educationis*, October 28, 1965, *AAS* 58 (1966) 728–739
gen.	general
GER	*Generale Ecclesiae Rationarium*, June 28, 1988
GILH	General Instruction of the Liturgy of the Hours
GIRM (1970)	General Instruction of the Roman Missal, March 26, 1970
GIRM (2000)	General Instruction of the Roman Missal, Canadian Conference of Catholic bishops, Ottawa
gl.	*glossa*
Glos. ord.	*Glossa ordinaria*
GS	VATICAN II, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, December 7, 1965, *AAS* 58 (1966) 1025–1115
HCW	Rite of Holy Communion and Worship of the Eucharistic Mystery Outside Mass
Hom.	Homily
HV	PAUL VI, Encyclical *Humanae vitae*, July 25, 1968, *AAS* 60 (1968) 481–503
IC	SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Immensae caritatis*, January 29, 1973, AAS 65 (1973) 264–271
ICL	Institute of consecrated life
ID	SACRED CONGREGATION FOR SACRAMENTS AND DIVINE WORSHIP, INSTRUCTION *Inaestimabile donum*, April 3, 1980, AAS 72 (1980) 331–343
IE	*Ius Ecclesiae*
IM	VATICAN II, Decree on the Means of Social Communication, *Inter mirifica*, December 4, 1963, *AAS* 56 (1964) 145–157
Ind.	Indult
Instr.	Instruction
IOe	SACRED CONGREGATION FOR RITES, Instruction *Inter Oecumenici*, September 26, 1964, *AAS* 56 (1964) 877–900
ITC	International Theological Commission
l.s.	*Latae sententiae*
LE	*Leges Ecclesiae post Codicem iuris canonici editae* (X. Ochoa, ed.), Rome 1966–1994
LEF	*Lex Ecclesiae fundamentalis*
Let.	Letter (*epistula*)
LG	VATICAN II, Dogmatic Constitution on the Church, *Lumen gentium*, November 21, 1964, *AAS* 57 (1965) 5–75
Litt.	Letter (*litterae*)

LMR	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, *Life and Mission of Religious in the Church* (Plenaria of SCRSI), August 20, 1980
MBR	*Magnum Bullarium Romanum*, Graz 1964–1966
MC	PIUS XII, Encyclical *Mystici Corporis,* June 29, 1943, *AAS* 35 (1943) 193–248
MD	PIUS XII, Encyclical *Mediator Dei*, November 20, 1947, *AAS* 39 (1947) 521–600
ME	Monitor ecclesiasticus
MeM	JOHN XXIII, Encyclical *Mater et Magistra* May 15, 1961, *AAS* 53 (1961) 401–464
MF	PAUL VI, Encyclical *Mysterium fidei*, September 3, 1965, *AAS* 57 (1965) 753–774
MG	PAUL VI, Allocution *Magno gaudio*, May 23, 1964, *AAS* 56 (1964) 565–571
MM	PAUL. VI, motu proprio *Matrimonia mixta*, March 31, 1970, *AAS* 62 (1970) 257–263
MP/mp	*Motu proprio*
MQ	PAUL VI, motu proprio *Ministeria quaedam*, August 15, 1972, *AAS* 64 (1972) 529–534
MR	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES AND SACRED CONGREGATION FOR BISHOPS, Directive Notes *Mutuae relationes*, May 14, 1978, *AAS* 70 (1978) 473–506
MS	SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction *Matrimonii sacramentum*, March 18, 1966, *AAS* 58 (1966) 235–239
NAE	VATICAN II, Declaration on the Relation of the Church to Non-Christian Religions, *Nostra aetate*, October 28, 1965, *AAS* 58 (1966) 740–744
no. / nos.	number / numbers
Notif.	Notification
NPCEM	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Norms for the Promotion of Candidates to the Episcopal Ministry in the Latin Church*, March 25, 1972, *AAS* 64 (1972) 386–391
NSRR	*Norms of the Tribunal of the Sacred Roman Rota*: (1934) June 29, 1934, *AAS* 26 (1934) 449–491 (1969) May 27, 1969, Typis polyglottis Vaticanis 1969 (1982) January 16, 1982, *AAS* 74 (1982) 490–517
OChr	SACRED CONGREGATION FOR CLERGY, Circular Letter *Omnes christifideles*, January 25, 1973
OE	VATICAN II, Decree on the Eastern Catholic Churches, *Orientalium Ecclesiarum*, November 21, 1964, *AAS* 57 (1965) 76–89
OR	*L'Osservatore romano*
Ord	Ordinary

RCIA	Rite of Christian Initiation of Adults, January 1, 1972
RConf	Rite of Confirmation, August 22, 1971
RDCA	Rite of Dedication of a Church and an Altar, May 29, 1977
REDC	*Revista española de derecho canónico*
Rescr.	Rescript
Resol.	Resolution
Resp.	Response
REU	PAUL VI, Apostolic Constitution *Regimini Ecclesiae universae*, August 15, 1967, *AAS* 59 (1967) 885–928
RF	Rite of Funerals, August 15, 1969
RFIS	SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Ratio fundamentalis institutionis sacerdotalis*, January 6, 1970, *AAS* 62 (1970) 321–384; Editio altera, March 19, 1985, Typis polyglottis Vaticanis 1985
RGCR	*Regolamento generale della Curia Romana*, February 4, 1992, *AAS* 84 (1992) 201–267
RH	JOHN PAUL II, Encyclical *Redemptor hominis*, March 4, 1979: *AAS* 71 (1979) 257–324
RM	JOHN PAUL II, Encyclical *Redemptoris Missio*, December 7, 1990, *AAS* 83 (1991) 249–340
RM (1969)	Rite of Marriage, March 19, 1969
RM (1990)	Rite of Marriage, March 19, 1990
RN	LEO XIII, Encyclical *Rerum novarum*, May 15, 1891, *Leonis XIII P.M. Acta*, XI, Rome 1892, 97–144
RomPont	Roman Pontifical
RP	Rite of Penance, December 2, 1973
RP	JOHN PAUL II, Apostolic Exhortation. *Reconciliatio et Paenitentia*, December 2, 1984, *AAS* 77 (1985) 185–275
RPE	PAUL VI, Apostolic Constitution *Romano Pontifici eligendo*, October 1, 1975, *AAS* 67 (1975) 609–645
RR	Roman Rota
rubr.	rubric
S. Cong.	Sacred Congregation
S. Th.	*Summa Theologica*
SAL	Society of Apostolic Life
Salamanca Com	*Código de Derecho Canónico, bilingüe comentada*, Salamanca, 11th ed. 1992
SAP	Sacred Apostolic Penitentiary
SapChr	JOHN PAUL II, Apostolic Constitution *Sapientia christiana*, April 15, 1979, *AAS* 71 (1979) 469–499
SArt	SACRED CONGREGATION FOR THE HOLY OFFICE, Instruction *Sacrae artis*, June 30, 1952, *AAS* 44 (1952) 542–546
SC	VATICAN II, Constitution on the Sacred Liturgy, *Sacrosanctum Concilium*, December 4, 1963, *AAS* 56 (1964) 97–138
SCB	Sacred Congregation for bishops

SCBR	Sacred Congregation for bishops and Regulars
SCC	Sacred Congregation for Clergy
SCCE	Sacred Congregation for Catholic Education
SCCong	Sacred Consistorial Congregation
SCCouncil	Sacred Congregation of the Council
SCCS	Sacred Congregation for the Causes of Saints
SCDF	Sacred Congregation for the Doctrine of the Faith
SCDS	Sacred Congregation for the Discipline of the Sacraments
SCDW	Sacred Congregation for Divine Worship
SCEC	Sacred Congregation for the Eastern Churches
SCEEA	Sacred Congregation for Extraordinary Ecclesiastical Affairs
SCEP	Sacred Congregation for the Evangelization of Peoples or for the Propagation of the Faith
SCHO	Sacred Congregation for the Holy Office
SCong	SACRED CONGREGATION FOR RELIGIOUS, Normae *Sacra Congregatio*, July 7, 1956
SCPF	Sacred Congregation for the Propagation of the Faith
SCR	Sacred Congregation for Religious
SCRit	Sacred Congregation for Rites
SCRSI	Sacred Congregation for Religious and Secular Institutes
SCSDW	Sacred Congregation for Sacraments and Divine Worship
SCSUS	Sacred Congregation for Seminaries and University Studies
SDL	JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges*, January 25, 1983, *AAS* 75 (1983) pars II, VII–XIV
SDO	PAUL VI, motu proprio *Sacrum diaconatus ordinem*, June 18, 1967, *AAS* 59 (1967) 697–704
Secr. St.	Secretariat of State
sect.	section
sess.	session
SFS	CONGREGATION FOR CATHOLIC EDUCATION, Circular Letter *Spiritual Formation in Seminaries*, January 6, 1980, *Leges ecclesiae*, 6, col. 7857–7867
Signatura	Supreme Tribunal of the Apostolic Signatura
SMC	JOHN PAUL II, Apostolic Constitution *Spirituali militum curae*, April 21, 1986, *AAS* 78 (1986) 481–486
SN	PIUS XII, motu proprio *Sollicitudinem nostram*, January 6, 1950, *AAS* 42 (1950) 5–120
SNAS	*Special Norms to be Observed in the Supreme Tribunal of the Apostolic Signatura ad experimentum*, March 23, 1968
SNB	Secretariat for Non-Believers
SOE	PAUL VI, motu proprio *Sollicitudo omnium Ecclesiarum*, June 24, 1969, *AAS* 61 (1969) 473–484

SPC	PIUS XII, Apostolic Constitution *Sponsa Christi*, November 21, 1950, *AAS* 43 (1951) 5–24
SPCU	Secretariat for Promoting Christian Unity
SRR	Sacred Roman Rota
SRR Dec	*Sacrae Romanae Rotae Decisiones seu sententiae*, 1–40 (1908–1948) TRIBUNAL APOSTOLICUM SACRAE ROMANE ROTAE, *Decisiones seu sententiae selectae*, 41–66 (1949–1974) TRIBUNAL APOSTOLICUM ROTAE ROMANAE, *Decisiones seu sententiae selectae*, 67–72 (1975–1980) APOSTOLICUM ROTAE ROMANAE TRIBUNAL, *Decisiones seu sententiae selectae*, 73 (1981)
SRS	JOHN PAUL II, Encyclcial *Sollicitudo rei socialis*, December 30, 1987, *AAS* 80 (1988) 513–586
SS	PIUS XII, Apostolic Constitution *Sedes sapientiae*, May 31, 1956, *AAS* 48 (1956) 334–345
StC	Studia canonica
Syn. Bish.	Synod of bishops
tit.	title
TRR	Tribunal of the Roman Rota
UDG	JOHN PAUL II, Apostolic Constitution *Universi dominici gregis*, February 22, 1996, *AAS* 88 (1996)
UR	VATICAN II, Decree on Ecumenism, *Unitatis redintegratio*, November 21, 1964, *AAS* 57 (1965) 90–112
UT	SYNOD OF BISHOPS, *Ultimis temporibus*, November 30, 1971, *AAS* 63 (1971) 898–922
VI	Liber sextus
VS	SACRED CONGREGATION FOR RELIGIOUS AND SACRED INSTITUTES, Instruction *Venite seorsum*, August 15, 1969, *AAS* 61 (1969) 674–690
VSp	JOHN PAUL II, Encyclical *Veritatis splendor*, August 6, 1993, *AAS* 85 (1993) 1133–1228
X	*Liber extra* (*Decretales Gregorii IX*)
yr.	year

TITULUS VII
De Matrimonio

TITLE VII
Marriage

INTRODUCTION

Juan Ignacio Bañares

1. *Introduction*

Book IV, "The Sanctifying Office of the Church," concludes its first part, which treats the sacraments, with tit. VII: "Marriage." It should be understood that this title does not try to exhaust the existential richness of marriage; yet, on the other hand, neither can it be thought to deal simply with the regulation of certain aspects of the life of the faithful "which the Church does not agree to transfer," as regards its competency, to the civil legislator. Moreover, as is known, the content of the term marriage is not arbitrary, nor can it be changed by the Church, by the State or by the contracting parties themselves. With that in mind, for an adequate understanding of the contents of this title, it should be kept in mind that: *a*) what is set forth in these canons is, in all its depth and precision, a true and complete juridical matrimonial system (other canons referring to this material are found in other places in the Code; we will refer to them later); *b*) the radical juridical dimensions regarding this material spring from basic anthropological truths, which constitute, as it were, its foundation; *c*) since marriage as such is a relationship, that of *being husband and wife,* it is the role of law to deal with the way in which this relationship is constituted, its object, its requisites, its effects, its particularities and its interruption and termination; *d*) because of this juridical viewpoint, which is proper to it, the text of the Code neither expresses nor develops in its fullness the Christian vocation to marriage, that is, marriage as part of the personal response to the plan—to the mission—which God entrusts to each one in the world and in the Church.

It is commonplace today to recognize that in certain sectors of the western world there has arisen a twofold "deterioration" in the concept of marriage and consequently in the concept of the family: first in the direction of a strictly positivistic appreciation, and secondly in the direction of

a purely sociological, or even phenomenological, level of its nature (pure *factum*). In the words of John Paul II in his Letter to Families: "our society has distanced itself from the full truth about man, from the truth about what man and woman are as persons. As a consequence, it cannot adequately understand what is truly the self-donation of persons in marriage, responsible love in the service of fatherhood and motherhood, the authentic greatness of the procreation and education of children."[1] For this reason, we think it necessary, in introducing this title, to dedicate a few pages to the anthropological background of this material, and then to emphasize how the juridical and theological dimensions affect this reality. The fundamental reasons for this approach are the following: *a*) without this approach, the canonical matrimonial system is not understood (in its contents, its scope, and its internal relations which qualify it as a system); *b*) the cultural situation regarding marriage and the family leads one to suppose that confusion may exist regarding basic concepts and realities: the person, freedom, sexuality, love, commitment, etc.; *c*) in this way the truth about marriage is emphasized and it is made clear that many norms and many ideas which appear in, or which underlie, the canonical matrimonial system are not the result only of a pragmatic motive, or of a political decision, or of reasons of pastoral usefulness. In short, the law is not here an instrument of power to regulate something good, but rather the law itself is measured against the actual truth of things, on the anthropological and theological levels, and arises from them and for them; *d*) only in this way can the bases for understanding the identity between marriage and sacrament (between the baptized) be established.

2. *Person, time and cosmos*

The development of the human person takes place in both a societal and chronological context. From an objective point of view man, as a creature, finds himself situated in the world, in the cosmos, and is "measured" by this reality. From a subjective point of view, he inevitably finds himself "in the path of development," as someone placed within time, subject to change, and therefore subject to the measurement of chronology. Certainly, the fact of being in the world is proper to every material creature, as is subjection to external change; and it can also be said that subjection to change, as measured by time, is common to every living creature. In the human person there exists a capacity for relationship with his surroundings, an interconnection which encompasses the conditioning of one's environment and its effects upon the person, but at the same time includes the possibility for the person to effect this same environment.

1. JOHN PAUL II, *Letter to Families*, February 2, 1994, no. 20; cf. also nos. 13, 14, 16; and *FC* 6–8.

a) *Person, change and time*

On one hand, chronology cannot be understood, in the case of the human person, as the mere process of change and its measurement. In fact, a person's experience of time constitutes his own history or biography, which is always personal. It necessarily implies the consideration of the particular relationship between a person and his environment, to which we have referred to above. Consideration must be made of the particular way in which the human person has to carry out his acts, and the particular way in which he must suffer the consequence, experiencing the effects of external actions.

It can be shown that the person does not fully possess, from the first moment, all that he can come to be. Therefore, time is not only a factor, but also a sphere in which the person develops. It can equally be shown that through this development the person is capable of adapting to the environment which surrounds him, is capable of understanding and dealing with the world, and of living the succession of his own changes in a way that favors the unfolding of his personal characteristics.

Moreover, through his own action man, in some way, makes himself in time, he puts it to his own use, in such a way that he is capable, by his own action, of "possessing" what he formerly lacked. Man's action spans the distance between himself and the cosmic and chronological dimensions through his own dominion of his personal being.

b) *Person and freedom*

The reason for this "dominion," even over that which measures him, proceeds precisely from the relation between man and his action, from his faculty of carrying out new acts, of constituting himself as the "origin" of such actions. He is their cause and his actions, as effects, are imputable to him. In short, the centrality of the personal character of man resides precisely in his freedom, in the capacity of using the resources of his own being, in relation to the world and to time, in such a way that his acts are not only directed to the immediate satisfaction of urgent needs, but also that they contribute to the ongoing development of his own "fullness" as a person.

The basic roots of the person as the subject of his own operations does not mean that he can live and develop his actions "at the margin" of the reality which surrounds him, nor does it mean that this reality does not impose some conditions which can certainly affect his will, such as facilitating his acts or making them difficult, or making them impossible. The radicality consists in that man, in normal circumstances, is capable of achieving that which most perfects him despite conditioning by his environment, and is capable of loving above all, and even of rejecting what the environment offers him by way of some other apparent good.

c) *Effects of the action*

It is useful here to recall the distinction between the "transitive effect" and the "intransitive effect" of an action. The transitive effect is that which is the object of the producing of a human action: the objectivity of the act as a product. Yet, as we have pointed out, man's free act does not arise from outside of himself, it is not produced by his environment, nor is it prompted by an automatic mechanism in relation to him. From this we see what is most definitive in the human act, that is, the "integration" of meaning which the subject places in it: his personal involvement as cause of the act. In addition, from this we see that the human act cannot fail to imprint a "mark," a directive inclination in the will of the one who carries out the act. In this way, through his acts, the human person constructs his own history and at the same time "builds up" or "tears down" himself as a person. One can call this effect intransitive precisely because it remains inherent to the subject and configures it, it constitutes the immanent dimension of the human act.

In summary, the person is capable of choosing, of electing ways of entering into relationship with his surroundings, producing acts which go beyond his environment, in such a way that he can attain new qualities and perfect his being through his activities. At the same time the acts produced by the person, apart from their effects upon the surroundings, also produce changes in the person himself. For this reason freedom requires the possibility of knowledge, because without conscious awareness of the surrounding reality and of himself, the subject cannot direct himself towards that which will benefit him in the development of his potential.

It can therefore be said that the passage of time, through the intransitive effect of acts, is "preserved" in the subject, and it can also be said that it builds him up, it accounts for his present. Moreover, since that which builds him up in a definitive way is this intransitive effect, which is the fruit of his freedom, it can be concluded that man masters time, and preserves the dominion which he had over it in his past actions.

d) *Person, time and freedom: commitment*

We must also consider that time which has not yet arrived can be lived in one or another way, can be given one or another meaning, and can even be possessed in an anticipated way: this is precisely the point of freedom. The way in which man "gets ahead" of time, embraces the future in an act which is only in the present, is precisely by commitment, which presupposes not only a decision "of reason," but also the decision to "obligate oneself" to the finality chosen and to the means needed to attain that finality. Thus man can undertake the path of his perfection not only when he succeeds in obtaining every value which betters him, but rather already from the moment in which he decides to advance towards the possession of those values, and, in turn, takes the necessary steps. This connection of the person to a value, insofar as it is a superior value, according to the

fittingness of the value to what a man is, and according to the scope and intensity of the subject's commitment of his free will, fulfills in the highest degree his freedom. It results in its greatest effective exercise, which produces the best intransitive effect.

In order for someone to direct himself toward what is most suitable, it is necessary, therefore, to have an integral and integrating understanding of himself, which has been called the capacity for "self-possession" and for "self-direction." The end which best integrates and harmonizes the other goods, the values which facilitate his own development, will be that end which facilitates greater unity in the person and a greater capacity to integrate his relationship with his surroundings and benefit from those surroundings. Thus, the end that leads one the farthest, if it is connected to an authentic value, is that which most perfects the person and most fosters his own talents.

3. *Interpersonal relations*

We have spoken so far of cosmos and of time, and of how freedom, the constitutive center of the personal being, comes into play in the dominion the person has over them. Clearly, however, man is not a solitary being, nor is he a creature thrown into an adventure of conquering what surrounds him, nor is he a subject who can acquire his greatest development through self-contemplation and through the knowledge of himself and of the world around him. Man cannot be a subject whose center is himself, condemned to remain enclosed in an impoverishment which lies below his true ontological status. Neither is man simply a being *capable of entering into relationship* with other human subjects, nor is he merely a creature open to a cognitive interrelation with others from which he can obtain "functional" benefits.

a) *The openness of the personal being*

The person is radically a "being for others." He is a being who cannot be *himself* without others. And he is a being who cannot be himself if he is not "for others." Natural sociability does not exhaust itself in the possibility of a merely intelligent relationship. It is necessary to find oneself face to face with another in order to grasp fully one's own nature and identity. For it is precisely in the "mirror" of the other person that one grasps profoundly what is shared and what is different, what is common and what is particular. I can fully understand my "I," not in contrast to the cosmos, but rather face to face with another person who can be recognized as "another I."

I need the other in order to "recognize" myself, and also in order to develop capacities which could not be unfolded by myself; in order to increase my potential for action by learning from the other person's knowledge, example and differences. Above all, I need the other because I need to recognize in him something absolute that I claim for my own dignity.

b) *The "other" as value*

Above we spoke of values and the connection between them. I cannot develop myself as a person if I do not discover that the other is a person *in the same way as I am*, and therefore he lives and sees himself in relation to the cosmos and to other persons, just as I do. He is a subject who enjoys freedom in the same way as I do, and he constitutes as singular and unique a being, in his freedom and in his personal history, as I am. This recognition of the other requires of me a way of treating someone, a way of relating, which is capable of valuing another for himself, in an unconditional way, since he has been unconditionally constituted as "another I." This particular form of recognition and way of treating someone is called *love*. It is the proper way of treating someone who can only be recognized as an end in himself, and never as a mere means.

If freedom must be connected to these superior values, superior since they are most fitting for a personal being, love for its part will constitute the proper act of freedom, and one can only strictly speak of love in referring to the relationship between persons. For this reason love, both as an act and as a stable disposition, is possible in regard to everyone, even in regard to unknown persons, because it arises from the simple recognition of someone's personal being, and consequently of his "absolute" value. Only God and other persons are "lovable," worthy of love.All other creatures of the cosmos can be seen as "attractive," desirable as means for attaining the end of the subject.

c) *Person, love and perfective development*

Love, by which the will is directed toward—is connected to—the good, seeks the good and rejoices in its possession, and constitutes not only the path for the development of a person's freedom, love is also the first and paradigmatic sign of his richness and dignity as a person. Someone who was only capable of loving things would in truth show himself to be capable of only loving the satisfaction that he finds in them. Someone who only loves others because he obtains a benefit from them in fact only loves the benefit he seeks from them: this is not really love since it always, in some way, reduces others to mere means. On the contrary, whoever recognizes the absolute value of another and summons up the free response of love, sees himself "in service" to the good of the other, finds himself called to serve the other. This self-donation proves to be, paradoxically, the dimension of the intransitive effect of his action which most fosters the unfolding of his personal riches.

In this way the one who knows how to love another has mastery over himself, integrates his relationship with the cosmos, and establishes himself as the master of his own time, of his biography, for the commitment which gives rise to love and makes this love effective presupposes precisely the discovery and the bringing about of the "gift of self." In this way it is also understood that whoever knows how to love becomes fully a

person, and therefore, in the last resort, he has no need of the benefits which he can receive from outside of him, but rather is happy through the intransitive effect proper to love, even when this love finds no response on the part of the one whom he loves.

In other words, to be happy it is necessary to develop oneself in a way fitting to one's own being. Man's being is open to the discovery of other personal beings and their value, and such a discovery allows him in turn to realize that one can collaborate in the "building up" of the other as a person. It requires that one place his own capabilities at the service of this end; and this dynamic of service or self-donation ends up leading the subject to his greatest perfectibility. This "spousal" dimension of the human being can be developed, consequently, through every true love: in celibacy, in marriage, in familial love, and in friendship.

The reason for this is that, from the point of view of the object, every person is revealed as an end, as a good greater than which exists no other, given his unrepeatable character,. From the point of view of *the subject*, as we have seen, the gift of self presupposes the greatest manifestation of freedom because it requires the greatest degree of self-possession: that which makes possible self-direction. From the point of view of the *loving action,* he who enriches others with the best of himself helps them to obtain the best from themselves, and he in turn obtains, through this action, the best from himself. In addition, from the point of view of the effect, there is no greater act than that of helping a personal being in the process of his perfection, since the person is the greatest good.

4. *The human person in his sexual dimension*

As we know, man's bodily nature is not something accidental. Man does not posses his materiality in the same way as do the other creatures of the cosmos, nor is man distinguished from them simply by way of his material diversity. The person is differentiated from the rest of the material universe in that he "is" his body. Not only is he a being more perfect in his bodily nature, not only can he use his body to achieve dominion over material bodies; his body transcends the purely biological dimension, for it "is" a personal body: it manifests and expresses the richness of a particular ontological status. Man's body is lived in its own "personal" way, distinct from other living beings.

a) *Person and bodily nature*

The bodily nature of man is certainly shared in common with his fellow men: but not in the same way as the bodies of like material creatures are shared in common by them. In the case of man, the very body of another man facilitates the recognition of the "other person," thus in another man I recognize not only a material similarity, but I also discover that this bodily nature reveals and expresses a subject who lives in the same

personal way as I do. Through the body, one can understand the language of personal existence, the "language of the body" which is unique to the person.

b) *Sexual identity*

The sexual dimension, in a way analogous to how man's body is personal, is understood as a dimension of the integral human person. Sexual identity involves not only a physical, biological, or even a psychic difference; rather it is a way in which the personal being is lived; the condition of being a person "comes to be" from and through the dimension of sexual identity; from masculinity or femininity. Every person is a person as a man or as a woman.

This means that masculinity or femininity subsists in the person as a particular structure that wholly forms each person: from that which is most material to that which is most spiritual. What is the characteristic that typifies this structure, and what relation does it have with what we have been considering presently regarding the personal being?

c) *Person, sexuality and freedom*

If we consider the person in his sexual dimension, we can say that the center of his ontological status is his freedom, and this freedom is offered to him as the possibility of self-perfection, something found originally in the person himself, through the act proper to him, which is love, If love then connects the subject with a personal value, or better, with a person as possessing value in himself, and if love is the relationship which best facilitates the process of personal development, through its intransitive effect, from this follows our next point. There can exist a special type of love directed precisely from and toward the sexual condition of the other person: toward the other as man or woman. The sexual dimension of the human person is understood as a structure which makes possible three levels of interpersonal relationship: a level of openness, a level of participation, and a level of communion. We should stress that it is not a question of separate or chronologically "successive" levels, rather each one opens the way to the other and is integrated into it. In the words of the Catechism of the Catholic Church, it can be said that the sexual dimension "embraces all the aspects of the human person, in the unity of his body and of his soul. It relates in particular to affectivity, to the capacity to love and to procreate, and in a more general way, to the ability of forming bonds of communion with the other" (*CCC*, 2332).

d) *Conjugal love*

The impulses that incline man or woman in this way, should, logically, be integrated in the "path of meaning" proper to the action of love: the act of love, proper to freedom, should promote one's balance and harmony. In the normal subject, this general tendency of openness to the other as a subject with a different sexual identity, once it is guided by love, is directed towards a concrete person. In this way the specific potentiality of the sexual

dimension desires and seeks in the other the end of a particular communion, thus, "sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such. It is realized in a truly human way only if it is an integral part of the love by which a man and a woman commit themselves totally to one another until death" (*FC* 11).

e) *Nature and person*

In summary, at the *level of nature*, the following series of demonstrated facts can be highlighted: *a*) *the diversity* between man and woman, the difference of the sexes, as *factum*; that is, this difference is not explained only by cultural norms or social conventions, or simply by juridical construct; rather it is this diversity, which precedes these factors, that precisely justifies the existence and variety of such norms or conventions; *b*) sexual diversity offers a specific *complementariness* to man and woman, based precisely upon the fact of their differentiation, and inasmuch as they are different; *c*) this diversity and complementariness are spontaneously manifested in a natural *inclination* towards persons of the opposite sex; *d*) there exists in the very constitution of man a biological connection, one which is radical, original and exclusive, between sexual union and the possibility of the *generation* of offspring.

In considering these realities at *the level of the person*, one can discover some consequences that should offer us a bridge linking the anthropological perspective with the juridical world: *a*) the person, in accordance with the dignity which is proper to him, should live his sexual dimension through his freedom, which is his perfective structure; *b*) the possibility of openness to the other, which is proper to the person, discovers in this dimension a special and specific avenue of communication; *c*) this communication of the person, in the sphere of his or her own masculine or feminine intimacy, can only take place through a suitable interpersonal relationship; *d*) this relationship, in turn, cannot arise except from an act of freedom; *e*) the act of freedom by which a person makes a gift of himself, as man or woman, concretizing the natural inclination which the person finds in himself, is the paradigmatic act of spousal love in its human dimension: "this society of man and woman is the first expression of the communion of human persons;"[2] *f*) since the sexual dimension belongs to the totality of the person, the handing over of this dimension can only consist of constituting the other (woman or man) —as co-possessor of and co-participant in this dimension; *g*) as a consequence, this act must be foundational and constitutive of a particular relationship,: that of spouses; *h*) the freedom to establish this relationship is grounded in the dignity of the person himself and is defined as one of his fundamental

2. *GS* 12. Cf. P.J. VILADRICH, *El pacto conyugal* (Madrid 1991); cf. J. HERVADA, *Diálogos sobre el amor y el matrimonio* (Madrid 1974), pp. 99–154.

rights, which encompasses: choosing to become a husband/wife, the choice of one's spouse, the untransferable character of the mutual commitment, with regard to the *in fieri* of marriage; the appropriate guarantee of assistance and protection of the bond that has come into existence and of any eventual offspring, with regard to marriage *in facto esse.*

5. *The dimension of justice*

We have thus established a connection between the anthropological foundation and the juridical dimension of marriage and family, given that the reality which we have outlined is social *ab origine*, is established in order to be social, is open to the possibility of an increase of society and creates obligations of justice in respect to society. It is not enough for society to establish the fundamentals of the "*ius connubii.*" The subjects who contract marriage "need" the recognition and protection of the society in which they live through its system of legal norms. They need the recognition of the relationship established between them, with its particular characteristics; they need the recognition of its effects: the relationship of parentage, questions relative to material goods and inheritance, and so forth. They need to be able to resolve doubts about the existence itself of the bond, or to resolve doubts about questions of justice regarding a possible suspension of the right to conjugal cohabitation.

a) *Marriage, society, and law*

Since marriage is a social reality with a "nuclear" character, society must establish an appropriate set of norms for this reality. Society is also interested in the protection of the parties as they take the steps leading to the decision to marry, in the protection of the bond and of the rights and obligations arising from it, and in juridical certainty regarding the bond which has been entered into.It is interested also in the harmonious development of the community of the family in the global context of that society, and in a fitting education of its members for marriage. As the Conciliar Constitution *Gaudium et Spes* pointed out, "the well-being of the individual person and of both human and Christian society is closely bound up with the healthy state of conjugal and family life" (*GS* 47). It can be plainly said that marriage forms the principal part of the "common good" of society, contributing to the building up of society and to achieving this common good.

For these reasons society, civil or ecclesial, must intervene juridically, not to limit the *ius connubii* of its members, but rather to make possible its better fulfillment. We discover, then, three lines which come together, from different points of origin, in a single point. The first consists of the reality itself of marriage, as it exists according to the constitution of the human person and the dynamic of his perfective development. The second is the reality of the right to contract marriage, which all human persons

have, The third is the necessary intervention of the society through its juridical system. If the three original points were linked so as to form the triangular base of a pyramid, the peak of the pyramid, the point where the lines come together, would be precisely the "moment" of contracting marriage; marriage *in fieri*. Society, therefore, cannot "invent" the object of commitment in marriage, nor can it "invent" the content on the conjugal bond. The contracting parties, for their part, cannot do this either, otherwise they would not be choosing to marry. Marriage in turn does not exist except in the concrete case, that is, between two concrete contracting parties within a concrete juridical system. This is the interrelation existing among the three elements mentioned above.

The commitment of the parties in this moment presupposes: *a*) a capacity, or an ability, which is objective and proportioned on the part of the *subject*; *b*) a proper "form" in respect to *the way of manifesting consent*, which can give rise to the necessary juridical certainty; *c*) the effective willing of the objective content of the conjugal relationship as the *object*. The norms regarding capacity, impediments, form and consent deal with these issues.

To safeguard the requirement of the necessary "ability" in order to exercise the *ius connubii*, society has the right to delineate the scope of "impediments," without ever harming the right itself. This means that society has the right to impose, for validity, determined conditions which protect the spouses themselves, the society and marriage itself: minimum age, the different degrees of relationship, etc. To insure the adequacy of the act of consent in relation to its object, the choice to be husband and wife, society can and must indicate the minimum conditions for the exercise of the *ius connubii*. Hence the influence of fear, fraud or the lack of authenticity in the declaration of the will of the parties, etc. are considered. To insure the appropriate certainty regarding the coming into existence of the conjugal bond, society can and must establish a form. In the case of the Church, four principal reasons for canonical form are set forth: *a*) sacramental marriage supposes a *liturgical act*; *b*) marriage introduces the spouses into an *ordo ecclesial* and gives rise to relationships of justice, of rights and duties, between the spouses themselves, with the children and also in regard to the ecclesial community itself; *c*) the state or condition of being married establishes a "situation of life" in the Church, and therefore it is necessary that it can be recognized and confirmed with certainty; *d*) the public nature of the manifestation of consent protects the commitment itself and facilitates fidelity to it. (cf. *CCC* 1631).

b) *The status of spouses*

Thus marriage *in facto esse*, a man and a woman lawfully united by a bond which is established in the very ontic structure of one's personal being, the content of which refers to this very structure, has its root origin in an act of the will of the parties.

The term "marriage" denotes a man and a woman who are spouses, who each participate in and co-possess the masculinity and femininity of the other, who give themselves and receive each other in a personal way precisely inasmuch as they are different and complementary in their sexual dimension. Given this, it must not be forgotten that "the conjugal pact is the origin of conjugal rights and duties, in the sense of being the cause of their coming into existence, but it is not their *root and source*, since the root and source of the juridical conjugal relationship is the dimension of justice in the ontic structure of the human person and in the ontological relationship which unites man and woman." Therefore "marriage, considered juridically, is not a conjugal pact, or contract, which has an ongoing existence; it is the conjugal community insofar as it has a juridical structure, the root and source of which is not a pact, a contract, but rather the ontic structure itself of the conjugal community."[3]

In summary, it can be said that the essence of marriage *in facto esse* consists of the juridical relationship constituted by the parties, which relationship constitutes the parties themselves as spouses, and the bond can be considered as the formal principle of this relationship.[4]

On the other hand, as we have indicated above, this juridical relationship has a twofold dimension. This is not a question of a dissection carried out upon a static entity having a twofold nature. Rather it refers to the *ordination* of the essence itself of marriage in its dynamic, teleological aspect. In fact, the object of the will of the parties in constituting themselves as husband and wife consists of giving themselves and receiving each other as spouses, as co-possessors of conjugality. Conjugality refers to the acts proper to spouses, and as a consequence, to the openness to possible offspring. For this reason the inclination of each spouse to seek the good of the other as a sexually distinct person, conjugal love involves the acceptance of the potential maternity or paternity which the other offers: "by its very nature the institution of marriage and married love is ordered to the procreation and education of the offspring and it is in them that it finds its crowning glory" (*GS* 48 a). In a reciprocal way, the richness and dignity of human beings requires that their potential paternity or maternity not be realized except in the sphere of a full and total mutual self-donation of the person in their conjugality. Traditionally this twofold dimension of the ordination of their essence has been called the "purposes" of marriage.

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3. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios. Hacia un sistema de Derecho canónico. III. Derecho matrimonial, 1* (Pamplona 1973), p. 181.
4. Cf. Th.M. VLAMING (L. BENDER), *Praelectiones Iuris Matrimonii*, 4th ed. (Bussum 1950), pp. 7–8.

c) *Essential properties*

This is not the place to pause to consider the essential properties of marriage: the unity and indissolubility of the bond, which come into existence with the bond and are inseparable from it. However, it is useful to note that these properties constitute essential characteristics of the bond, and are required by each end and by their interrelationship. There cannot exist a true conjugal love that does not tend to make of itself a gift, and to receive the other as a gift in what is conjugal. The constitutive act of marriage, however, properly consists of a commitment that confers this gift under the title of a debt, conferring upon the other the title of co-possessor of my person in its sexual dimension. Consequently, this love cannot be shared with others, nor it such a commitment divisible. This is so because conjugal love tends towards unity, and establishes unity as the commitment owed in marriage. Moreover, this unity "is made clear in the equal personal dignity which must be accorded to man and wife in mutual and unreserved affection" (*GS* 49 b).

Furthermore, we have seen that the essence of marriage consists in the relationship which mutually makes the contracting parties co-participants in conjugality. The *juridical* character of this relationship, the dimension of justice regarding the bond, signified fittingly by the commitment which establishes this relationship, the act of matrimonial consent, involves this *title of debt* to which we have alluded. Thus, what was before a possibility of the freedom of each one now becomes an obligation and a right of both, and such a self-donation, which is so intimate, of the person cannot be full if it does not extend to the entire possible future of his life story. We shall note below that commitment means the anticipated dominion over future time, precisely through the binding of the subject by an act of his freedom.

6. *The sacramental dignity of marriage*

It is commonplace to refer to the sacred character of the institution of marriage, even in referring to marriage between persons who are not baptized (*natural* marriage). Keeping in mind what has been said above, it is not difficult to understand this special dignity which is attributed to the conjugal community. But it is not our purpose here to refer to this type of natural sacredness of marriage, but rather to the fact of the establishment of marriage by Christ as a true sacrament of the Church.We refer to the *sacramental being* of the marriage of the Christian faithful.

a) *The ius connubii*

Certainly, the fact of being one of the faithful does not change the human person nor does it affect the content of his fundamental rights, and thus neither does it change the content of the *ius connubii*. It does, however, shape it. From the point of view of a member of the faithful, he has

the moral obligation to prepare for, to celebrate and to develop his marriage in harmony not only with his Christian vocation, but also as an integrating part of that vocation. From the point of view of the Church, she has the obligation of preparing her faithful for the celebration of marriage and of helping them to live it in consonance with their condition of being children of God and members of the Church; she must protect the institution of marriage as an integrating part of the supernatural common good of the Church herself.She must also adequately respond to doubts raised about the validity or nullity of a bond which has been contracted.[5]

b) *The plane of grace and the plane of law*

The Church discharges this responsibility, in her juridical system, in different ways. In the sphere of *form*, she ordinarily requires a specific rite for the celebration of nuptials. With respect to *impediments*, she protects in a special way the faith of the contracting parties, and she protects certain juridical situations, born of a free bond, which are not compatible with the exercise of the *ius connubii*: situations arising from the reception of holy orders and from the lawful taking of certain vows. On the contrary, *as regards consent itself*, the supernatural plane of sacramental marriage does not require any particular specification.

The reason for this consists in the following: *a*) marriage already existed from the appearance of man upon earth; *b*) what Jesus Christ revealed was his will to constitute this reality, already existing, as a sacrament; *c*) there was no will to impose or invent a distinct reality, nor to change the existing reality; *d*) the will of Christ that constitutes marriage as a sacrament means that the spouses, when both have received baptism, are constituted as a sign, receive a particular supernatural grace to live their conjugal condition, and are called to undertake a role and task in the context of the ecclesial community. For this reason sacramentality is found in the marriage itself, that is, in the two members of the faithful in their relationship as spouses, hence the identity between sacrament and marriage.

The shaping of marriage by its sacramental dignity consists exactly in its elevation to the supernatural plane, as an effect of the condition of the spouses being baptized persons. This elevation to the supernatural level is concretized by the fact of it being a sacrament, a sign of the union existing between Christ and his Church, a perceptible and efficacious sign of the grace which both signifies and produces it. "Christian marriage in its turn becomes an efficacious sign, the sacrament of the covenant of Christ and the Church. Since it signifies and communicates grace, marriage between baptized persons is a true sacrament of the New Covenant" (*CCC* 1617). This elevation plainly corresponds to the purpose that God has for marriage and the family within his saving plan, is such a way that

5. Cf. J.I. BAÑARES, "El *ius connubii*, ¿derecho fundamental del fiel?" in *Fidelium Iura* 3 (1993), pp. 233–261.

"by reason of their state in life and of their position [Christian spouses] have their own special gifts among the People of God" (*LG* 11). We have before us, then, a marriage which has all the "normal characteristics of all natural conjugal love, but with a new significance which not only purifies and strengthens them, but raises them to the extent of making them the expression of specifically Christian values" (*FC* 13). Hence it is not a matter of a mere blessing of what is natural, but rather of an elevation of that which those who were elevated to the condition of being children of God through the reception of baptism establish between themselves.

c) *Marriage, family life, and law*

Precisely because of this identity between marriage and sacrament, the development of conjugal and family life is hardly dealt with in the Code. The fullness of marital and family life is part of, a dimension of, the fullness toward which every Christian is oriented *a radice* by virtue of the universal call to holiness. The Magisterium of the Church treats this subject in many documents, and it belongs, in turn, to the sphere of the freedom proper to the condition of being children of God. "Marriage—says the Roman Pontiff—remains the usual vocation of man, which is embraced by the great majority of the people of God."[6] This fullness, clearly, cannot be restricted to juridical terms as it greatly transcends them, particularly since the Second Vatican Council, it has become clear that "for a Christian marriage is not just a social institution, much less a mere remedy for human weakness ... Husband and wife are called to sanctify their married life and to sanctify themselves in it. It would be a serious mistake if they were to exclude family life from their spiritual development."[7]

All in all, the present Code has endeavored to utilize terminology which corresponds to the rich perspective of the Council, which reveals in a profound way this fullness towards which Christian marriage should be directed. Some canons even use expressions which point beyond the law (for example, in speaking about preparation for marriage, or of the obligation of educating the children). But the direct intention of the legislator consists in regulating those aspects which contain a dimension of justice, and especially those which refer to the valid constitution of the conjugal bond. For this reason marriage is defined in only one canon (c. 1055), while many more are necessary to outline the requirements referring to impediments, consent, capacity, form, the separation of the spouses or the dissolution of the bond.

It is logical, however, that the existential unfolding of the vocation to marriage of the faithful does not require a juridical regulation to the same extent as that vocation. The personal free response to the Christian

6. JOHN PAUL II, *Letter to Families*, cit., no. 18.

7. St. J. ESCRIVÁ DE BALAGUER, "El matrimonio, vocación cristiana," in *Es Cristo que pasa. Homilías*, 2nd ed. (Madrid 1973), no. 23.

vocation opens up a panorama of *maximums*, of ideals of the life of faith. The attainment of these will depend upon each one, upon his formation and upon his effort to acquire natural and supernatural virtues, especially charity, which should inform the rest. The role of law, on the other hand, must be specifically to establish the *minimums* necessary to contract marriage, given that every person, and therefore, every member of the faithful, enjoys a fundamental right to marriage, and this right precedes any judgment regarding the fullness of his response to the Christian vocation. For this reason it is easy to understand why parents, pastors, educators—the Christian community—have the greatest responsibility regarding marriage and family: both present and future marriages and families.

7. *The juridical regulation of marriage in the Church*

During the first millennium, the Church did not develop a juridical system concerning marriage.[8] Certainly she was concerned with underlining the moral criteria and with correcting errors which arose, at times hand in hand with certain heresies, and the Hierarchy intervened when it judged it necessary, even establishing disciplinary norms to correct abuses. It was in the 12th and 13th centuries that theologians and canonists were faced with the need to determine the essential elements and boundaries of marriage in order to be able to judge the validity or nullity of the bond in concrete cases which were brought before them. It was precisely because of this practical necessity that different questions were raised. Did the bond arise from the sole act of consent, or rather from the accomplishment of conjugal sexual intercourse? What was the role of the consent of the families, or the justice of impediments in certain civil legal systems; etc. Until the Council of Trent, the Church imposed no canonical form of celebration as a requirement for validity, and in some places this did not take full effect until some centuries later.

It can be said in summary that: *a*) the Church has always been conscious of the sacred character of marriage in the new law, and of her legitimacy in applying justice *in casu*, which is the paradigmatic function of law; *b*) for centuries the Church did not find it necessary to establish a complete juridical system in regard to marriage; *c*) in extending the faith in Europe this role of the Church took on greater importance, and a theological and canonical doctrine was systematized in reference to marriage; *d*) for historical circumstances, and in order to safeguard the common good which marriage signifies for civil and ecclesial society, the Church

8. For a history of marriage as seen through the lens of Church interventions, cf. J. GAUDEMET, *Le mariage en Occident. Les mœurs et le droit* (París 1987), and the corresponding bibliography.

opted for the development of her own juridical system, the independence of which was consolidated with the establishment of a canonical form for the celebration of marriage;[9] *e*) the Church continues to accept the validity of civil norms for her faithful in regard to specific effects of marriage.

a) *The twentieth century*

The *CIC*/1917 constituted a serious effort to collect the diverse norms regarding this material and its finality was more of a practical and functional type, such that the systemization and the focus were centered upon the different factors, juridically relevant, which might be found in the preparation for marriage, in its celebration and valid constitution, in its effects, and in the possible changes in conjugal life. The perspective of the present Code rests upon the anthropological and theological vision of the texts of Vatican Council II, especially upon the relevant chapters of the Constitution *Gaudium et Spes* (47–52).[10] It also draws upon the *CIC*/1917, upon the norms issued after the *CIC*/1917, upon the jurisprudence of the Tribunal of the Roman Rota, and upon the contents of the documents of the Magisterium, especially the Apostolic Exhortation *Familiaris Consortio* of John Paul II.[11] The *CCEO* was promulgated after the *CIC*, as was the *CCC*, which was issued in 1992 and includes the texts of quite a number of canons from this present title. It will be useful, therefore, to keep in mind these documents when studying the text and context of the Code, in order to interpret and weigh the most important changes from the *CIC*/1917.

b) *The contents of this title*

The arrangement of the contents of the title we are examining follows a linear, logical and functional pattern. The title opens with some general canons about marriage which take up questions of varying importance. In the first canons we find the description of the marriage covenant and its sacramental dignity, its essential properties; the role of consent and the right to marriage. Beginning with c. 1059, we find consideration of the jurisdiction of the Church over every marriage in which one of the contracting parties is Catholic, the declaration of the "*favor iuris*" and its scope, the concept of ratified marriage, of consummation and of putative marriage, and the promise of marriage and its effects.

Continuing on, ch. I, "Pastoral care and the prerequisites for the celebration of marriage," gathers together different norms dealing with this stage, which are nonetheless preceded by two newly promulgated canons which deal explicitly with the pastoral care of the faithful in what refers to marriage, which care should be extended before, during and after the celebration of marriage.

9. Cf. J. CARRERAS, *Las bodas: sexo, fiesta y derecho* (Madrid 1994).

10. Cf. also *GS* 12 and 87; *LG* 11; *SC* 77–78.

11. Cf. equally the Encyclical *Humanae Vitae* of Paul VI, the Ap. Let. *Mulieris Dignitatem* and the *Letter to Families* by John Paul II.

Further on, following the classical schema for the treatment of this material, we find the canons treating impediments in general and in particular (ch. II and III); consent: defect and error of consent, marriage by procurator and with the help of an interpreter, and the presumption that consent perdures (ch. IV); and the form (ch. V). The two following chapters treat particular marriages: mixed marriages (ch. VI) and marriages celebrated in secret (ch. VII). Next we find the canons which treat the effects of marriage (ch. VIII); ch. IX, which treats the separation of the spouses, is divided into one article on the suppositions for the dissolution of the bond and a second article on separation while the bond remains.

Lastly we find the canons on simple convalidation and radical sanation, and two articles grouped under the generic rubric of ch. X regarding the convalidation of marriage. Finally, it must be remembered that not all of the material on marriage is regulated in the canons of the present title, for example, the right to choose a state of life is found in c. 219, and the principal rights and duties of the spouses in regard to the Church and to their children are in c. 226, Both are within the rights of the faithful which correspond to the earlier draft of the *LEF*; we also find set forth systematically in another place (tit. III of book III, "Catholic Education") some specific canons referring to the right and obligation of parents regarding the education of their children, parents are also referred to explicitly at the very beginning of book IV ("The Sanctifying Office of the Church": c. 835 § 4). Otherwise there is a brief isolated reference in speaking about the validity of admission into a novitiate (c. 643 § 1 , 2°) and into initial probation in a secular institute (c. 721 § 1, 3°); and finally the regulation of the different matrimonial processes is found in book VII (tit. I of part III, cc. 1671 to 1707).

1055 **§ 1. Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.**

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

§ 1. The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptized, been raised by Christ the Lord to the dignity of a sacrament.

§ 2. Consequently, a valid marriage contract cannot exist between baptized persons without its being by that very fact a sacrament.

SOURCES: § 1: cc. 1012 § 1, 1013 § 1; *CC* 543–556, 581–584 et passim; PIUS PP. XII, Alloc., 3 oct. 1941 (*AAS* 33 [1941] 421–426); SCHO Decr. *De matrimonii finibus*, 1 apr. 1944 (*AAS* 36 [1944] 103); PIUS PP. XII, Alloc., 29 oct. 1951, IV; *LG* 11, 41; *AA* 11; *GS* 48; *HV* 8; OCM 1, 2; *GCD* 59; PAULUS PP. VI, Alloc., 9 feb. 1976 (*AAS* 68 [1976] 204–208)
§ 2: c. 1012 § 2; *CC* 554

CROSS REFERENCES: cc. 1056–1059, 1061, 1063, 1065–1066, 1084–1086, 1095–1096, 1099, 1101, 1117, 1134–1137, 1141, 1151

COMMENTARY

Juan Ignacio Bañares

1. *Introduction*

The first paragraph of this canon, which is the first in the *title* treating marriage, clearly takes up the well known text of *Gaudium et spes* 48: "The intimate partnership of life and the love which constitutes the married state has been established by the Creator and endowed by Him with its own proper laws: ... by its very nature the institution of marriage and married love is ordered to the procreation and education of the offspring." Confirmation of this is found in the recent Catechism of the Catholic

Church that included, without further commentary, the textual citation of the first paragraph of this canon in beginning its treatment of the sacrament of marriage.

It has been generally noted that while the identity of marriage was, obviously, left intact here, the Conciliar Fathers manifested an express intention of adapting the language, the perspective and the degree of depth and richness of the terminology used regarding the conjugal covenant. It was a matter of considering the substance of marriage *in recto*, establishing the positive features of its identity, anchored in its anthropological foundation and responding in depth to the sensitivity of our times.

2. *The terminology of the new Code*

As is well known, canonical doctrine has from its earliest days approximated, by way of analogy, marriage *in fieri* to the juridical concept of a "contract," thus underlining the principle of consensuality upon which it is based[1]; this was also the mindset, at the beginning of their work, of the consultors of the corresponding *coetus* in the reform of the *CIC*/1917.[2] Nevertheless, the use of the term contract, while offering the evident advantage of *underlining* consent, could present some notable disadvantages, especially given the loss of the original meaning of contract in canon law, and given the ever more technical and aseptic development of contractualist doctrines in civil systems of law. In fact, at the present time the term contract could lead to an excessively *objectivistic*—reifying—notion in the minds of the contracting parties. This is especially true if we keep in mind that, in order to make the object of the conjugal pact more materially and juridically tangible, this object was frequently spoken of strictly in terms of a "*ius in corpus*," with the diminished understanding this signifies regarding the reality of the object of consent.[3]

On the other hand, the influence of civil doctrine regarding contracts lead to a *positivistic* outlook with respect to the regulation of marriage by the legislator in numerous countries. This outlook in turn produced a *relativistic* approach, one in which an attempt is made to *establish* the very content of the marital relationship, whether that be according to the concrete ideology of the legislator in power, or according to the simple personal choice of the parties themselves. The insistence upon the consent of the parties as the origin of the "contract" could be upheld in a doctrinally formed ecclesial society since, even if this notion could lead to an impoverished interpretation of the reality of marriage, in the heart of the

1. Cf. F.J. WERNZ-P. VIDAL, *Ius Canonicum*, V (Rome 1946), pp. 42–45.
2. Cf. *Comm.* 9 (1977), pp. 120–121.
3. Cf. R. LLANO CIFUENTES, *Novo Direito matrimonial Canônico* (Rio de Janeiro 1990), pp. 10–31.

Church herself there was a gradual deepening of the understanding of the objective content of the conjugal pact which offered the possibility of maintaining the use of the term contract, with appropriate nuances. In fact, the second paragraph of this canon uses this expression, yet only after its content has been sufficiently clarified by the specific content of the first paragraph.

However, when basic anthropological principles are lost or blurred in a society, then stressing a contractualist outlook results in a second breakdown that gives rise to the positivism and relativism pointed out above. Hence the twofold wisdom of the new Conciliar terminology.

In order to overcome this excessively contractualist outlook some authors have emphasized the "institutional" reality of marriage, describing it as an institution to which the contracting parties "adhere." This perspective attempts to emphasize the connection that exists *per se* between the will of the parties and the objective nature of the conjugal relationship, but this comes at the price of accepting a certain fiction. Since the reality of marriage is "a man and a woman as spouses," it is identified with the bond that unites them, and does not exist, except as an object of reflection, as something external and prior to this relationship. Perhaps this consideration is the reason why the legislator dropped the word "institution," in spite of the fact that the Council used it at different points, and decided to use more specific terms in the present Code.

For these reasons, in order to present the full and positive meaning of marriage, the Code has expressed juridical realities without ordinarily making use of technico-juridical terms, which would be exceedingly cold and impoverished, coming as they do from other spheres of intersubjective relationships, such as those relating to contracts, or which could be manipulated by reason of their use in systems of civil law. Thus, the consensual origin of the spousal relationship is expressed as a "covenant," and its character as a society is set forth through the term "partnership." If at first it might have seemed to some authors that the exclusion of traditionally accepted terms and their substitution by terms of less technical rigor could suppose a surrender to ambiguity (or to a belligerant anti-juridicism), today the new terminology is firmly established and the wisdom of the choice of the legislator is unanimously recognized. Moreover, the use of the term *covenant* calls to mind the richness of the theological content without departing from the juridical dimension, which is the Code's direct concern.

3. *The natural and supernatural content of marriage*

It must be kept in mind that the legislator is not directly concerned with providing a complete definition of marriage, in it deepest philosophical meaning, but rather with setting forth an adequate description of its substance which suitably reflects the dimensions of justice involved.

In a simple, plain and solemn way the legislator introduces the material with the following principal sentence: "The marriage covenant ... has, between the baptized, been raised by Christ the Lord to the dignity of a sacrament." It is thus clear that: *a*) in Christian marriage "the spouses are by a special sacrament strengthened and, as it were, consecrated for the duties and the dignity of their state" (c. 1134, taken up in *CCC*, 1638) and consequently this type of marriage indicates a relationship, in an immediate way, with the Church, given that this entails a sacramental reality; *b*) the faithful are subject to the Church in what regards marriage, especially in constituting their marriage as a sacrament (*CCC*, 1639–1640); *c*) it was by the will of Christ, as in the case of the other sacraments, that the sacrament of marriage was instituted (*CCC*, 1114); *d*) by way of difference from the other sacraments, in this sacrament what is elevated is precisely something already existing: a reality in nature itself (*CCC*, 1603–1605); it was not "converted into a sacrament," but rather it was raised, and transcended, to the plane of the dignity of a sacrament; *e*) "covenant" signifies the relationship itself of the spouses, the bond that exists between them and that constitutes them as spouses. Moreover, the material is treated initially as being interconnected within the general context of the "sanctifying office of the Church," following the treatment of the other sacraments.

In an apparent paradox, given this plain and simple initial clause of the sentence, a subordinate relative clause is employed in order that the entire description of what marriage is as a natural reality ("a man and a woman establish between themselves a partnership of their whole life") depends upon the term covenant. Another clause that modifies the term partnership (*consortium*) indicates the relationship of this term with the ends proper to it (this partnership is "of its own very nature ... ordered to the well-being of the spouses and to the procreation and upbringing of children"). What significance can be attributed to the fact that it was decided to grammatically express such important and notable content in subordinate clauses depending upon a principal clause? It seems that the intent was to deliberately present all the material from a sacramental point of view, and, at the same time, it is clear that there exists an identity between the whole contents of the sentence and the doctrine that Jesus Christ willed to elevate this reality to a sacrament.[4] Thus the second paragraph can set forth, in a straightforward manner, the following conclusion: "Consequently [*quare*], a valid marriage contract cannot exist between baptized persons without its being by that very fact [*eo ipso*] a sacrament." This conclusion refers not to the inseparability, but rather to the *identity* between the conjugal pact and the sacramental reality: there cannot be, between the baptized, a merely natural marriage (see introduction to tit. VII: 6. *The sacramental dignity of marriage*).

4. Cf. P. GASPARRI, *Tractatus Canonicus de Matrimonio*, I (Typis polyglottis Vaticanis 1932), p. 33.

4. *Covenant and partnership*

We have already referred to the term *covenant*. It certainly contains theological echoes with Biblical roots, it also clearly refers to an action between persons: it points to an anthropological dimension sustained in freedom. Yet besides this, we judge that some typically juridical elements can be sifted out insofar as it indicates: *a*) a plurality of subjects; *b*) a free union of the wills of these subjects regarding a common object; *c*) agreement regarding future goals and behavior; *d*) the establishment of a new relationship between the members of the pact, precisely by virtue of the manifested will of the parties; *e*) the natural tendency to permanency in what has been entered into; and, *f*) some mention of the objective nature of this covenant.

The expression "by which a man and a woman establish between themselves a partnership of their whole life" makes explicit the elements of this covenant. The preposition *by* denotes the consensual origin of the relationship that arises between the contracting parties, and therefore the irreplaceable character of consent, which will be treated specifically in c. 1057. This free union of wills, which is constituted as a covenant, is not only shown to be necessary, but is also shown to be the only cause sufficient per se to give birth to this relationship. In this way, the preposition *by* indicates that the proper effect of the covenant is "something" which the contracting parties *constitute between themselves* through, by means of, the covenant. The expression *constitute between themselves* reinforces the idea of intersubjective consent—at the *origin*—, and of a new and stable mutual relationship—in the *object* of the common act of will.

The object of the conjugal covenant is described as *a partnership of their whole life*. The term *partnership* (*consortium*) offers certain advantages over other possible terms and helps to avoid ambiguities. It makes reference to a reality of a relational nature, and, more concretely, to a relationship with a societal character, to a community.Yet it is itself in keeping with its consensual origin founded in the will of the parties, but at the same time it points to a solid and objective *quid*, which is already constituted. It includes, moreover, an explicit allusion to a *unique* life project, to a "common lot." Thus, regarding the past, it refers to the willed origin of the pact; regarding the present, it points out the constitutive character of the pact; and regarding the future, it indicates the pact's capacity to extend itself fully into the future. Finally, the term partnership in itself does not harken back to any usage found in law that is ambiguous, or contradictory to what is set forth here.

The specification "of their whole life" is included as a particular characteristic of the partnership itself, not only as a condition for stability, as a *quid permanens*, but also as a requirement of the will of the woman and of the man for founding a relationship as woman and man, in what refers to the sexual dimension of their persons. The same ideas, with

different nuances, will come up in c. 1056 in speaking about the essential properties of marriage, and in c. 1057 § 2 in reference to the irrevocable character of the covenant.

5. *Differences between the sexes*

When the text of the Code refers to the constituent parties of the relationship in their sexual dimension ("a man and a woman") it is indicating a requirement of the partnership *natura sua*: both in the constituent parties as well as in the relationship constituted by them there must be not only the common condition of persons, but also the sex of each party as a differentiating, but unifying, trait. In fact, the covenant that establishes the relationship highlights the equality of the parties in regard to the origin of the act of will to marry, inasmuch as it is the common beginning of the pact. For this reason it is not necessary to state here that both the man and the woman are personal beings. If they were considered only as originators of an act of the will, it would not be necessary to specify the parties as man and woman. Thus, when the text explicitly names them in precise terms which underline the differences between the sexes, it means that this difference is had not only in the origin of the act of will, but also in its end, which is none other than the object of the covenant: the partnership.

Thus when it is said that a woman and a man establish between themselves a "partnership of their whole life," it means that they establish it specifically as *man and woman*, in what concerns the very complementariness of the sexes—their conjugality. What is conferred and received in the marriage covenant is the *constituting of themselves as spouses*, that is, the handing over, and the acceptance, of each one to the other in his or her sexual dimension: as co-participants in this dimension. It is precisely this co-possession which is concretized in a relationship of rights, the conjugal *bond*. From this whole context it is clear that heterosexuality is not a requirement or exigency of positive law, nor it is a free choice of the parties. Among other reasons, this is because the legislator is not speaking of sexuality and its different uses, but rather a *characteristic* of a type of natural relationship, elevated to the supernatural plane among the baptized, which the legislator is *discovering* and describing as something that preexists in reality. Moreover, this requirement of the conjugal pact is made explicit presently in the text itself, in making immediate and direct reference to the internal ordination of the partnership itself.

6. *The unity of the ends*

Thus when the canon states that the partnership "of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children," it is speaking of the very *tendency*, the dynamic,

of the relationship. It refers to the essence itself of marriage, and yet, simultaneously, it is treats the essence of marriage as something moving towards an end to which it points. For this reason, it speaks of these two elements as the *ends* of marriage, and they are understood as *ordinations of the essence of marriage*. It is important to underline here that the *good of the spouses* cannot be identified simply as the good to any two persons, but rather that it refers directly to the partnership established between a man and a woman, hence it is clear that it is the partnership which is "ordered by its own nature."

In fact, it is not a question of two isolated or superimposed pieces, but rather of a single reality, the partnership constituted by both spouses, that contains and develops itself in two dimensions. First, the relationship itself of the spouses, each one seeking the good of the other, requires the mutual giving and acceptance of the sexual dimension of each one of them, and consequently of his or her potential fatherhood or motherhood. Secondly, in turn, the ordination of the partnership to the generation and education of offspring must be brought about in a conjugal way by a person who, by a title of right,is owed to the other in the integrity of his sexual dimension. That is, when we treat the possibility of the generation of children, it is essential that we consider the way in which concrete persons enter into the relationship that makes this possible. Moreover, when we treat the full mutual giving regarding the sexual dimension of the person, it must be said that this cannot come about without including the possible fatherhood or motherhood that this entails. Even beyond this, one cannot speak of the conjugal community without referring to its ends: and an understanding of the nature of the ends and their unity is required for adequately understanding the essential properties of marriage, since each of these properties is derived from and required by each of the ends. Moreover, in a sacramental marriage this unity of the ends is especially highlighted since, in the words of the Constitution *Lumen gentium*, "in virtue of the sacrament of Matrimony by which they signify and share the mystery of the unity and faithful love between Christ and the Church (cf. Eph 5:32), Christian married couples help one another to attain holiness in their married life and in the rearing of their children. Hence by reason of their state in life and of their position they have their own gifts in the People of God" (*LG* 11).

1056 Essentiales matrimonii proprietates sunt unitas et indissolubilitas, quae in matrimonio christiano ratione sacramenti peculiarem obtinent firmitatem.

The essential properties of marriage are unity and indissolubility; in christian marriage they acquire a distinctive firmness by reason of the sacrament.

SOURCES: c. 1013 § 2; *CC* 546–556, et passim; *GS* 48; *HV* 25; OCM 2

CROSS REFERENCES: cc. 1055, 1057, 1059, 1061, 1063, 1066, 1085–1086, 1095–1096, 1099, 1101, 1134–1136, 1141, 1142–1150, 1151–1153, 1162

COMMENTARY

Juan Ignacio Bañares

1. *Marriage and its essential properties*

This canon is a continuation of the radically sacramental point of view with which the legislator has sought to begin the general treatment of marriage. In fact, c. 1055 established the identity between marriage and the sacramental reality (see commentary on c. 1055). In this canon we find an application, by way of affirmation, of what the elevation of marriage to the status of a sacrament entails.

The exposition is clear and linear: in the first clause, it is established, in a direct and categorical way, that "*the* essential properties of marriage are unity and indissolubility." This affirmation implies the following presuppositions: *a*) the canon is referring to marriage *in facto esse*, given that these properties cannot be predicated of marriage *in fieri*, at least not without important specifications and nuances which refer to its realization in marriage *in facto*; *b*) the marriage which is being treated is natural marriage, every marriage, independently of its elevation to the order of grace. This is demonstrated by the specific content of the subordinate relative clause which follows and closes the text of the canon; *c*) the essence of marriage has *properties*; *d*) these properties consist of the unique and indissoluble character of the bond, since the bond constitutes the formal principle of the essence; *e*) only these noted can be considered as essential properties; and *f*) it does not preclude that marriage can have other

properties, nor is the importance that these possible properties could have from an objective or subjective point of view treated, but it is established, by exclusion, that they *cannot* be considered essential properties.

Marriage consists of a woman and a man united in a special and determined personal communion. This partnership of life is founded upon three anthropological principles: the diversity of sexual identity of the human person, the complementariness of this differentiation and the natural inclination of the sexes between themselves which is ordered to the good of the spouses and the generation of children (see introduction to tit. VII: 5 c, *Essential properties*). In fact, this natural structure of human society makes possible a type of relationship, regarding the sexual dimension of woman and man, which encompasses three levels: communication, participation and mutual co-possession. Each one of these levels is specified in the one following, which concretizes and establishes it. The *core* is established by spousal love, which concretizes the *inclinatio naturalis* making it devolve upon a determined person, and leads towards establishing the conjugal union. The *way* in which this is established is through the conjugal covenant, since only through his own free act as a subject can a person make a donation of himself. And it is this act of giving oneself in his/her sexual dimension of femininity or masculinity, and of receiving the other, as a *gift* that causes the mutual possession of each other (co-possession) in this dimension.

The object of this gift (see introduction to tit. VII and commentary on c. 1055) is none other than each one of the contracting parties, in that which is conjugal. Moreover, what is established by this gift is a *relationship* between the parties that surpasses the sphere of pure *fact* in order to enter intentionally into the sphere of *law*. That is, what is proper to the conjugal covenant is the will of the parties, not only to love each other and remain united, but also to establish precisely a *bond*, a relationship grounded in the dimension of justice which arises from the pact itself. This is a "title of justice" according to which each one is owed to the other in the sphere of the relationship established. For this reason it is said that the bond constitutes the essence, or, more exactly, the formal principle of the essence, of the relationship established: of marriage *in facto esse*.

Why does this union, in order to be a true marriage, and not something else, require the properties that are cited in the present canon? In principle it can be said that it is precisely the ontological richness and dignity of the sexual person, who is constituted at once as subject and object of the pact itself, which requires these properties as elements constituting the dimension of justice in the relationship of the bond. For the sake of specificity, it is fitting to look at this question from different perspectives.

2. *Unity*

We begin by analyzing the property of *unity* in marriage.

a) *Unity and marriage "in fieri"*

In the dynamic perspective of marriage *in fieri*, it can be said that if the will of establishing a partnership is concretized in the act of "wanting to be a spouse," that is, of wanting to give oneself and to be received as either wife or husband, such a will is not capable of being multiplied. The reason for this is that someone who wants to give himself in a dimension, such as the sexual, which totally embraces his person, and who desires to receive the other as a gift equal to himself, cannot, at the same time, want to do this in respect to a third party (cf. c. 1135). On one hand, this dimension, as the *object* of the act of the will, cannot be either divided or shared, precisely because it is personal. On the other hand, the dignity of the *subject* does not permit a split between his sexual dimension and his personal being, in such a way that the same person gives himself simultaneously to various persons. Thus, just as the sexual dimension, being man or woman, is realized in the person and "is exhausted" in him, likewise the condition of being a spouse "is exhausted" in the person.

b) *Unity and marriage "in facto esse"*

In the typical perspective on marriage *in facto esse*, the question of unity as a property should be seen in relationship to the essence, properties and ends. Regarding the *essence*, found in the relationship of the bond which is established between the spouses in constituting themselves as spouses, it can be said that the bond cannot be multiplied because there cannot exist two titles of justice in respect to the same object (the man or the woman in his/her sexual, conjugal dimension) which are at the same time full titles (cf. cc. 1134, 1085). If these bonds are distinct, at least one of them will not be a conjugal bond. If one claims that they are equal, they cannot coexist because it is not possible to live as a spouse in a duplicate way, or to have such a spouse, the condition of totality proper to the subject and to the object of the pact would be lacking. In every case, moreover, the multiplication of bonds would produce problems of justice that are impossible to rectify.

c) *Unity and the ends of marriage*

In regard to the *ends*, ordinations of the essence, these also require unity. The well known text of the Const. *Lumen gentium* recalls that "the intimate union of marriage, as a mutual giving of two persons, and the good of the children demand total fidelity from the spouses and require an unbreakable unity between them" (*GS* 48). The good of the spouses requires, as a presupposition in its origin, the recognition of the equal dignity of both parties, and as its end the giving to the other of the complete richness of one's masculinity or femininity (which, obviously, is not reduced to the sphere of physical sexuality). It also requires, however, as the means of personal realization, the co-possession of the other in this

same feminine or masculine dimension. The conjugal intimacy that necessitates this good of marriage cannot be achieved if the relationship is not exclusive, it could not be total, it could not encompass the integrity of the person. The good of offspring equally requires the exclusivity of the bond, potential motherhood or fatherhood cannot be given wholly if it is shared. The connection between conjugality and motherhood or fatherhood would be broken given that one, or both, could be parents without sharing the conjugality which should give rise to the relationship of filiation.

d) *Children*

Moreover, the personal dignity of the children demands the requirement of being born of parents who are spouses to each other, that is, whose mutual donation is full and exclusive. It can be added that, in the practical order, the sustenance and education of the children would encounter insoluble difficulties, not only material difficulties, but also of the moral order. Children, as a function of their dignity as persons, seek an exclusive and joint dedication (cf. c. 1136).[1] It is true that the separation of the spouses can occur without there being an attempt against the unity of marriage, and separation is permitted by the Church in determined circumstances, but the situation in this case is different. In a separation, the father or the mother with whom they no longer live, continues to be his only father or mother. Living with each parent can be divided up, and the separation itself is accepted precisely because of the impossibility of the continuance of conjugal living together and consequently is accepted as an exceptional situation, as a lesser evil and, in the end, as a remedy for the good of the children themselves. The separation of the parents never arises from the very foundational will of the marriage, as an object of the conjugal pact itself, but rather as an extreme solution, in fact, of a *de facto*, and as far as possible, a temporary situation (cf. cc. 1152–1153, 1155).

In short, the interrelationship of the ends (see commentary on c. 1055) results in the fact that each one cannot give himself except in and through the fullvassumption of the other. This renders stronger and more stable the motives for supporting each other.

e) *Unity and conjugal fidelity*

It should be remembered, at this point in our discussion, that traditionally in the Magisterium and in canonical doctrine and jurisprudence, fidelity has been considered as a characteristic included in unity, or at least, as comparable to it. In this regard, it is fitting to point out some precisions: *a*) the specific intention against unity consists in wanting to have various conjugal bonds at the same time; on the other hand, the intention against fidelity can be understood in two ways: as a fault against the commitment established in the conjugal pact, or as the will of the contracting party to

1. Cf. A. BLAT, *Commentarium Textus Codicis Iuris Canonici, Liber* III, Pars I (Rome 1920), p. 500.

continue freely making use of his sexual condition in order to share it with persons other than his spouse; *b*) the first of the intentions against fidelity contemplates, without anything further, adultery as a *fact*, refers to marriage *in facto esse*, and does not break the bond although it can be the cause for a *separation* between the spouses; the second case refers to marriage *in fieri*, affects the very act of the will constitutive of the pact, and produces its nullity; *c*) when comparing the cases of an intention against unity and an intention against fidelity, we are always referring, as is obvious, to the marital will of marriage *in fieri*; *d*) the reason for the usual identification, or at least, and more precisely, *comparison*, of the intentions against unity and against fidelity are rooted in the fact that both unity and fidelity have for their object the direct protection of the same good: the exclusivity of conjugal life; and *e*) the difference lies in that in the case of an intention against unity the contracting party claims a faculty of establishing ulterior bonds, while in the case of an intention against fidelity he does not claim this; the similarity lies in that, also in this second case, the contracting party deliberately wants to continue being the master of what he apparently hands over, he wants to continue making use of his personal dimension, which he is now constituting someone else as co-possessor of. In short, in both cases the contracting party is not giving himself fully as his spouse. Contrariwise he seeks to keep the fulfillment or non-fulfillment of what he has theoretically promised in the sphere of the free disposition of his will, as a true right.

3. Indissolubility

a) *Indissolubility and marriage "in fieri"*

With respect to *indissolubility*, if we examine the perspective of marriage *in fieri* which we were speaking of above, we can consider that an act of marital will which leaves open one's self-donation in the dimension of time cannot be complete; it cannot exhaust the sphere of conjugality; it cannot be fully anchored in one's personal character. The richness of the person is such, and the ontic structure that makes marriage possible is so rooted in it, that it is not possible to give oneself while reserving the duration of the bond: for what gives rise to the conjugal pact is precisely a relationship, like filiation, or motherhood and fatherhood, sustained in this structure which exists *in the order of being*. The marital will does not consist in wanting to "play the role of a spouse," but rather in wanting to "be a spouse," and relationships established in the order of being are fixed in the person and perdure in him.

To want dissolubility is to seek to remain as master of the donation which has been effected, which, consequently, is not a full donation. It is, at root, wanting to have the very existence of the bond, regarding its *end*, depend upon one's own exclusive will, and as if it were a subjective right.

b) *Indissolubility and marriage "in facto esse"*

In the perspective of marriage *in facto esse*, the motives that correspond to the essence and the ends can also be commented upon separately. The *bond*, in fact, although originated exclusively by the will of the parties, once established cannot be broken by the will of the spouses themselves or by others. The reason for this is that the object of the pact does not consist of an arbitrary choice determined by the contracting parties or by positive law, but rather is established upon the very structure of the person, as we have seen, and it is established through putting into action a potency *of nature*. Certainly one is completely free to effect or not the actualization of this "union of natures," but once it has come into being, the bond is constituted with the force and necessity of nature itself (cf. cc. 1134, 1141).

From the point of view of the *good of the spouses*, it must be noted, in the first place, that the process of collaboration in the perfecting of the other, and of one's own perfection in carrying out this task, cannot exist with the alleged dissolution of the bond and the cessation of the condition of being spouses.[2] For this reason this end of marriage, inasmuch as it is an ordination of the essence, requires indissolubility. When there is, however, a collapse of conjugal life together, neither the essence of the relationship established between the spouses nor its ordinations or ends is modified (cf. cc. 1151–1155). The maintenance of the bond, in spite of everything, constitutes a greater good, given that even the situation of collapse in mutual marital life does not suppose an absolute failure of the person as such, rather, it can be lived according to the dignity of the personal subject. The breaking of the bond, does not respect this dignity.

In regard to *the good of offspring* as an end of marriage, it is fitting, in certain measure, to refer back to what we have pointed out concerning unity. To this must be added the effect which can be had in the children upon seeing multiplied not only the conjugal bonds of their parents, even though this be in a "successive" way, but also the specious relationship of fatherhood or motherhood in their regard, and the alleged multiplication of relatives, (especially of likewise specious brothers and sisters).

c) *Indissolubility and unity*

It is fitting to add, in regard to both unity and indissolubility, some important considerations. The first deals with the opinion that indissolubility is no more than unity considered in its temporal aspect: the attempt against the bond, and thus against unity, in a successive way. Of course the close relationship between both properties is evident, given with good

2. Cf. Th.M. VLAMING (L. BENDER), *Praelectiones Iuris Matrimonii*, 4th ed. (Bussum 1950), pp. 17–21.

reason that both are inherent in the very essence of the same reality: marriage.[3] It can be said, however, that someone who intends against unity necessarily wants the temporal co-existence of various bonds. Someone who intends against indissolubility, on the other hand, *usually* does so seeking a new, "allegedly successive" bond. In this case, it could be said that *objectively* he would be intending against unity, since objectively the former bond cannot be dissolved. But *subjectively*, according to the act of the will, even in this supposition he does not tend directly toward the multiplication of bonds. He does not want various spouses, he directly wants (and precisely this), the possibility of *terminating* the contracted bond, which is a different question. Alternately, there could also be the case of someone who does not plan to contract a new bond, but rather simply wants to free himself from the bond he constituted, and from the consequent juridical situation. In this case the difference between the two properties is seen with even greater clarity. In all cases, it remains clear that since the marital bond is not dissoluble, a "civil divorce" that attempts to break this bond in reality has no capacity whatsoever to do this. For this reason the initial bond continues in existence for divorced persons, and while this bond remains, while the spouse is alive, no successive marriage can be valid.

d) *The exclusion of indissolubility*

The second consideration arises regarding those who think that, at its root, someone who excludes an essential property is carrying out nothing less than a *total simulation* of marriage (see commentary on c. 1101). On this question the following observations may be offered: *a*) In a total simulation the simulating party rejects marriage itself, that is, such simulation consists exactly in that the contracting party does not want to establish a conjugal partnership, does not want a marital bond, does not wish to give himself as a spouse or to be received as a spouse. In the exclusion of one of the essential properties the contracting party *wants* to establish a relationship based upon a bond, with obligations and rights deriving from this relationship, but he wants it with a content that does not respect the essence of the object of the conjugal pact. *b*) In objective terms, it is correct to say that whoever rejects unity or indissolubility does not truly want marriage, and this is certain. For this reason the marriage is null, but since the basis of marriage is in the will of the parties, an examination of the object of the will of these persons can be legitimately carried out in each case, and this object is different, where one of the essential properties is excluded, from the case where marriage itself is rejected. *c*) The nucleus of the question lies in that, whereas the object of consent is offered by the personal structure itself of man, in the act of the will of the parties, there occurs the dissociation "subjectively objective" between

3. Cf. E. MOLANO, *Contribución al estudio sobre la esencia del matrimonio* (Pamplona 1977), pp. 104–106.

what they want as marriage and what marriage is in truth; that is, they can want as marriage something which is not marriage. In reality, on the other hand, the juridical relationship of the bond, which is established by the founding will of the parties, is not separable from the specific object of the outlines of the relationship. The conjugal bond cannot exist *a se*, but rather there only exists "a woman and a man as spouses" (conjugally bound together).

In these cases of partial exclusion, the act of marital will is incomplete and thus incapable of founding a marriage, since the unity between the essence and the essential properties are such that in reality the essence cannot be constituted without the support of those properties. This support requires, at the very least, the absence of their rejection on the part of the contracting parties. The will to contract marriage has such force that in principle it involves in itself, and gives rise to, the establishment of the complete bond, with its essential properties. Although they be unknown or there exist a contrary opinion, the bond arises accompanied by these essential properties, as just requirements proper to it; but when the very will which attempts to found a bond, attempts this with one of these properties positively lacking, that marital will is insufficient, and not even the very seeking of the bond can rectify this substantial limitation in the attempted act of consent.

The absence, or defect, of a suitable marital will can be produced by different sets of facts. It can be due to an incapacity (cf. c. 1095); it can be caused by a substantial error regarding marriage in which these properties are not even known *in nucleo* (marriage as "a permanent partnership between a man and a woman," c. 1096). It can be produced by an error about one of these properties, when the error is such that it ends up "determining the will" (c. 1099). It can also have its origin in the direct will of the parties themselves, with or without condition (cf. cc. 1101 § 2, 1102). In each of these cases, when the particulars corresponding to any of these juridical categories are present, the marriage is invalid.

e) *Indissolubility and the common good*

The third consideration refers to the foundation of the essential properties, not regarding the structure itself of the conjugal partnership, but regarding *the scope of society*. It cannot be forgotten that marriage is, itself, a societal reality, it constitutes the basis of both civil and ecclesial society, and carries out a fundamental (because it is a foundation) task in both orders. Consequently marriage is not solely a personal good, nor a right of the subject in a private aspect of his life, but rather it truly and properly constitutes an important element of the *common good*, both in the civil society and in the people of God, both in the natural order and in the order of grace. "... in virtue of the sacrament of Matrimony by which they signify and share (cf. Eph 5:32) the mystery of the unity and faithful love between Christ and the Church, Christian married couples help one another to attain holiness in their married life and in the rearing of their

children. Hence by reason of their state in life and of their position they have their own gifts in the People of God (cf. 1 Cor 7:7)" (*LG* 11).

For this reason another basis upon which is founded the unity and indissolubility of marriage should stem from the arguments which show the social advantageousness, in both civil and ecclesial society, of the defense of such properties, *as a dimension of justice of the common good.* This is not the place to develop these arguments, but it is appropriate to recall that this is not a matter of an ideological choice based upon a confessional prejudice, but rather that we are speaking of defending these realities, in the civil order, with reasons and arguments that are properly civil, of citizens inasmuch as they are citizens. Their non-confessional arguments can be shared with any other member of society, whatever religion he may profess, since marriage and its essence, its ends and its essential properties are not the exclusive patrimony of the Church, but rather are a gift of God for the whole of humanity, a gift for the good of persons and for the good of peoples.[4]

4. *The essential properties and the sacramentality of marriage*

Let us now recall that the second clause, which closes the text of this canon, is a relative clause whose antecedent is the set of essential properties we have been commenting upon. The text of the Code states, regarding these properties, that "... in Christian marriage they acquire a distinctive firmness by reason of the sacrament." It can be noted concerning these words: *a*) that Christian marriage is the same natural marriage, with its same essence and essential properties; *b*) that by Christian marriage is understood every marriage contracted by validly baptized members of the faithful; or every natural marriage when those who were not baptized receive baptism; *c*) that the essential properties have a firmness, a stability, inherent in natural marriage: derived from natural marriage itself; *d*) that this firmness is operative for every natural marriage, that is, in a marriage in which one of the parties has not validly received baptism; *e*) that only marriage between baptized persons is a sacrament, as c. 1055 indicates; *f*) that in a marriage between the baptized the firmness of these properties is strengthened in a proper, specific way; *g*) that this *peculiaris firmitas* proceeds precisely from the fact that, when entered into by the baptized, marriage is constituted as a sacrament, as an original reality on the supernatural plane; and *h*) that there are not two types of essential properties (one in natural marriage, and the other in marriage between the baptized), nor are there two firmnesses, distinct and added on (one in

4. Cf. R. LLANO CIFUENTES, *Novo Direito Matrimonial Canônico* (Rio de Janeiro 1990), pp. 100–128.

each type of marriage), but rather the properties themselves are *strengthened* in the firmness which they already have in themselves.

As we have noted, sacramental marriage and natural marriage have the same essential properties, because these properties derive from what marriage is in itself, they are inherent to it (intrinsic indissolubility). Thus c. 1133, in parallel with the canon we are commenting upon, states: "from a valid marriage arises a bond between the spouses which by its very nature is perpetual and exclusive; furthermore, in a Christian marriage the spouses are strengthened and, as it were, consecrated for the duties and the dignity of their state by a special sacrament." In the case of the indissolubility of a *natural* marriage, although the bond cannot be dissolved by the will of the parties, or by the civil power, nor even by the ordinary power of the pastors of the Church, nevertheless the Roman Pontiff can, in determined cases, dissolve the conjugal bond of the marriage, always and only in favor of the faith of a baptized person or of someone who wants to receive baptism (cf. cc. 1143, 1148–1149), (this is not the place to treat this special prerogative of the Supreme Pontiff). It is of interest here only to highlight the special firmness which the essential properties obtain in a marriage between the baptized: As will be seen in its place, the firmness of indissolubility which Christian marriage possesses as a sacrament is fully acquired with the consummation of the marriage (cf. c. 1141). Before this, there can also be, by a special privilege of the Roman Pontiff, the dissolution of the conjugal bond (cf. c. 1142).

1057 **§ 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet.**

§ 2. Consensus matrimonialis est actus voluntatis, quo vir et mulier foedere irrevocabili sese mntuo tradunt et accipiunt ad constituendum matrimonium.

§ 1. A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power.

§ 2. Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage.

SOURCES: § 1: c. 1081 § 1; *CC* 541; *GS* 48; PAULUS PP. VI, Alloc., 9 feb. 1976 (*AAS* 68 [1976] 204–208)
§ 2: c. 1081 § 2; *HV* 8

CROSS REFERENCES: cc. 219, 226, 1055–1056, 1058, 1062, 1063, 1073, 1095–1103, 1104, 1106–1108, 1134, 1156–1159, 1161–1163

COMMENTARY

Juan Ignacio

1. *Consent as the foundational act of marriage*

The first paragraph of this canon textually reiterates § 1 of c. 1081 of *CIC*/1917, presenting two basic principles of the consent required to establish the partnership of conjugal life. It states that consent is the fundamental causal element of marriage and establishes who may give effective consent (the parties) and who may not (any other willful power).

Let us first consider the central statement: "matrimonium facit partium consensum." It can be broken down into a series of linked ideas: *a)* What is "brought into being," the end of the "bringing into being," is marriage. *b)* Since marriage is being considered as the "end" produced, obviously the text refers to marriage *in facto esse*. *c)* The Latin term *facit* perhaps better than the English *produce* shows the absolute nature of the statement being made. Latin *facere* may emphasize more clearly the difference between the "before" and the "after" of the act since what "is brought into being" is precisely what was not done before and did not

exist. Furthermore, if the act to which the text refers is an act of will, which is the case, then it means that the act has not been performed before, it is new, specifically performed to produce that effect. *d)* The term *facit* (Eng. *produce*, "brings into being") also shows the basic causality of the act, since causality in itself is not presented as "shared" with other elements,[1] although *requirements* are later specified for the consensual act *to be effective. e)* The proper *subject* of the act is not the parties directly considered as individuals, but their *consent.* This distinction is important because it emphasizes the unity of the act of consent. There are not two independent consents that added together make a third, that would be strictly consent to the marriage. Instead, when the parties mutually consent to the proper object of the covenant, their consent is unique and effective. *f)* Finally, by "the parties" is meant both the parties to the covenant as being the sole origin of matrimonial consent and also as the end or purpose of the consensual act.

2. *"Legally capable" persons*

Secondly, the following part of the sentence needs to be considered: "by the lawfully manifested consent of persons who are legally capable." The whole phrase is adverbial, telling *how* marriage is brought into being; "lawfully manifested" is a participial phrase modifying *consent.* The phrase "by persons who are legally capable" also modifies consent and indicates who must give it. This means that consent must have certain *elements* for it to be causally effective. It also means that those elements are distinguished from the causative force, which is contained only in that kind of consent.

The Latin and English texts are perhaps more precise in their grammatical construction than the Spanish text. The words "*consensus inter personas iure habiles* legitime manifestatus" and "lawfully manifested *consent of persons who are legally capable*" clearly establish the primary connection between "consent" and "persons." In the Spanish, however, "*el consentimiento* de las partes legítimamente manifestado entre *personas jurídicamente hábiles,*" "consent" and "persons" are separated by the expression "legítimamente manifestado."

The phrase "of persons who are legally capable" indicates *a)* that the act of consent is the act of a person as such; *b)* that it refers to a plural number of subjects, as will be specified by reference to the adjective clause "who are legally capable"; *c)* that each of the parties is the origin and end of the consensual act; *d)* that there is a distinction between the right to perform the foundational act that a person has, and the *legal capability* of

1. Cf. A. DE SMET, *Tractatus Theologico-canonicus de Sponsalibus et Matrimonio*, 4th ed. (Bruge 1927), pp. 75–82.

exercising the right, showing a clear reference to c. 1055, c. 1058 and to the canons that concern impediments; *e)* that both elements, the person's right and exercising the right, are dimensions of justice related to the person; *f)* that *capability* must be regulated by the law; and *g)* that the dimension of justice of the foundational act is an interpersonal relationship whose nature is not yet determined.

3. *Legitimate manifestation of consent*

As we have said, the specification "*legitime manifestatus*" primarily refers to the persons who exchange consent and not to their required legal capability. The terms express a formal requirement, that is, they refer to the *manner* in which the act of consent must be *given*. The implications are the following: *a)* The consensual act must be manifest; it must be an external expression. *b)* The manifestation must formally conform to the established norm. *c)* The Church and only the Church has the authority to establish the adequate manner of manifesting consent. *d)* The requirement is extrinsic, formally speaking; it has no causative force in itself since the logical subject of the verb "is brought about" is only "consent" (i.e., consent brings about marriage). *e)* The requirement of external manifestation, however, is necessary for validity; only when consent is "lawfully manifested" is the its effect produced. There is, nevertheless, support in the very nature of the act of consent and its effects. Since consent is an act originated by the will of the two parties (social in its origin and its end), it must necessarily be recognized by some unequivocal form of manifestation.

4. *Singular character of consent*

The last sentence of this paragraph, "This consent cannot be supplied by any human power," acts as a link between the description of the act of consent as a human action and the development of the object of the act, which will be expressed next in the second paragraph. It could be said that the content of this sentence is properly a consequence of the second paragraph, but it was not idly included at the end of the first. It introduces the text to follow, as we have said, and in declaring the act to be such, it emphasizes the requirement that is intrinsic to the consensual act. It thus shows the inseparability of the consensual act and its objective content.

A propos of consent, in stating "This consent cannot be supplied by any human power," the legislator is making a *declaration*, not a *constitutive* statement. There is an immediate and direct link between the content of the act and its unsubstitutable nature that we shall see below. The legislator also *reveals* the immediate consequence of this principle for other parties who are not the principals. The consequence is *revealed* as a given,

something that *already exists* before the legislator makes the statement. That means that the text is not prohibitive in nature, in an imperative way, but simply indicates an impossibility through a flat statement in the present tense: "cannot be ... by any ... power."

There is a formal redundancy in the Spanish translation, "ningún poder." and "puede" (*poder* is the infinitive of the verb "to be able" and *puede* is the third person singular, while *poder* is also a noun meaning "power"), that also makes the original Latin text "qui nulla humana potestate suppleri valet" preferable here. It is interesting to note that the subject of the clause is the consensual act, a construction in the passive voice. Without undertaking a technical analysis, it seems that the concept of "potestas" is richer and more inclusive than the term "poder" in Spanish. It indicates a broader reference to any form of constituted authority; it also evokes the content of "potestas" in Roman law, for example, as in *paterfamilias*, and does not lend itself to the minimizing interpretation that sometimes occurs with the Spanish term "poder." In any case, the expression "no human power" is taken at its broadest, the irreplaceable nature is best shown if we remember that not only no other person, but no other form of exercising power can supply this consent. The Latin verb *valere* brings out the absolute impossibility, *a radice*, of any attempt to make a substitution for the consensual act. The meaning of the verb, to be strong, vigorous, have the ability to, be effective for, indicates clearly that the inability is intrinsic, that it derives from the very nature of the act of consent. Therefore, logically, the effect of attempting to ignore this principle would result in a nullity per se that is not curable.

The Spanish and English meaning of "supply" is based originally on the corresponding Latin verb *supplere*, which means "to complete by adding what is lacking, to fill out." That makes it clear that the content of an act of human will as exemplified in the object of consent to marriage cannot "be supplied," because if there is no such act, there is nothing, there is *nothing* to be "completed." In other words, the cause comes strictly from a person's voluntary act, which is indivisible and cannot be substituted because it cannot be repeated. Similarly, when an act of consent is null and void due to insufficiency, nothing and no one can make it valid, and vice versa.[2]

Finally, specifying that no "human power" can supply consent refers expressly to any form of power, whether derived from natural law or positive law, that society may establish. Here we have a principle belonging to the ontic structure of human beings, and consequently it cannot be displaced by any other form of decision, even if it has total social support or enjoys total protection from positive law. The legislator logically includes himself, as an ecclesiastical legislator, and recognizes his own limitation,

2. Cf. F.J. WERNZ-P. VIDAL, *Ius Canonicum*, V (Rome 1946), pp. 584–586.

his total lack of authority to modify the consensual principle that is presented.

5. *Nature of consent*

The second paragraph concerns the *nature* and *content* of the act of will that constitutes consent proper. The legislator expressly states the contents of the first paragraph that marriage consent consists of an act of will. In *CIC*/1917 the object of consent was described as a primordial "ius," "ad actos per se aptos" for engendering offspring. The present Code, with enrichments from the Magisterium, especially from Vatican Council II, from canonical jurisprudence and doctrine, and from other humanities sciences, has opted for the following: *a)* to begin its treatment of marriage with a newly created canon that did not exist in *CIC*/1917 and which describes marriage as a whole, underlining the personal dimension of conjugality (c. 1055); *b)* to move the old canon that defined consent (c. 1081) from its place in *CIC*/1917 to the beginning of the chapter on consent, just before beginning the canons on possible defects of consent, to the place this c. 1057 holds among those on marriage in general and immediately after the description of marriage and its essential elements. This brings out not just the personal dimension and object of the act of consent, but also the place it occupies as an essential piece in the canonical marriage system. In addition, the proximity of the texts of cc. 1055 and 1057 point out more clearly the intrinsic reference of each to the other. *c)* to substitute the explicit mention of man and woman for the term "parties," thus immediately showing the relationship of consent and its object with the sexual (conjugal) dimension of a human being (see introduction to tit. VII); *d)* to explain the mutual nature of consent through the expression "give and accept one another"; and *e)* to show the relationship between consent, "the covenant," in which they mutually give and accept one another, its irrevocable nature and it proper effect: "for the purpose of establishing a marriage," with an almost explicit reference to the contents of § 1 of c. 1055.

6. *Consent as an act of the will*

The fact that consent is "an act of will" indicates *a)* that it is proper and exclusive to the personal subject, a foundation for the impossibility of supplying it; *b)* that it is an act *of will,* that is, it can only originate in the will; that it is this power (and no other, such as understanding, although understanding is vital) that contains the definitive causal force[3]; *c)* that it is an act; it must therefore be a concrete and sure expression of a decision,

3. Cf. F.R. AZNAR GIL, *El Nuevo Derecho Matrimonial Canónico*, 2nd ed. (Salamanca 1985), p. 299.

something new and "original," arising from a person. A "state of mind" or a habit is not sufficient; the causative force must be specifically directed toward the object of consent, here and now; therefore it would have no effect if it were revoked before being stated, and that would require another specific act of will by the person; *d)* it must be an act of the will with a fullness in proportion to its object, as will be developed negatively in the canons that treat of the pathology of consent; and *e)* thence the foundation of those canons (cc. 1095–1103) is anchored in some way, although not always immediately, in the very nature of the act of matrimonial consent.[4]

7. *The object of consent*

The novel phrase in this paragraph, "an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage" contains a sequence with deep juridical and anthropological content. First there is the internal coherence of the text. Just as in the first paragraph, the term "persons" was used, and that sufficed because the text of the Code refers to the act of the will in relation to the originating person and in the social dimension regulated by the law. Here, however, it is *necessary* to specify the sexual differentiation of the parties, to name the persons as female or male, since it says that they "mutually give and accept one another," and the object of this giving is precisely their conjugable dimension, in the words of Hervada, "a man and a woman ... with the natural potentials of their sex as related to the purposes of marriage."

Secondly, the prepositional phrase "by which," referring to the act of matrimonial will, adequately shows the causative effect of the consensual act and the exclusivity of the effect; only through the act of the will that constitutes consent do a man and a woman give and accept one another as spouses.

Thirdly, the whole nucleus of the consensual object is found in the expression "mutually give and accept one another for the purpose of establishing a marriage," the "end" of the act of the will. Here is revealed the intrinsic relationship between consent as an act of the will of the parties, the parties as subjects, the object of the act, also constituted by the parties, and the resulting effect: the continuity between *in fieri* and *in facto esse* of marriage.

On one hand, giving and accepting one another mutually indicates that the giving and accepting of each one alone is completed only with the accepting and giving of the other. No doubt the acts of will that the parties

4. Cf. J.M. MANS PUIGARNAU, *Derecho Matrimonial Canónico*, I (Barcelona 1959), pp. 297–316.

perform are numerically distinct, there are two acts. Consent, however, is one and unique, because each act of each party constitutes an act of consent in and with the act of the other. Each one gives himself to himself and accepts the other as spouse in the same act, and *through* the accepting and giving of the other party. Consequently, there is no real possibility of an individual, "isolated" consent, since each act of matrimonial will always refers to the matrimonial will of the other party. This fact of reality can be properly understood if we consider that what is constituted is a relationship in which the parties, man and woman, are simultaneously the origin and the object of the act. To marry consists in "becoming spouses," becoming co-possessors in the sexual dimension, and, since this is a relationship, it is not possible for there to be only one party.

In addition, "mutually" refers to the two moments of marriage, the constitutive moment, and to the relationship established thereby. In the text of the canon, this reality is expressed by saying that they mutually give and accept one another with the same will *to establish a marriage.* Thus it is shown that marriage *in facto esse* is the object of marriage *in fieri,* and thus the act of intentional will of the parties must be specifically directed toward being the foundation of the juridical situation of the spouses. The expression *ad constituendum* directly underlines the *founding* condition of the consensual act, the fact that it is an act that is the origin of a new reality inaugurated by the act itself. Thus the parties will be married only if *they wish to be* and if *what they wish is marriage,* such as it really is, such as the structure of a human being profiles it and offers it.

Fourth, speaking of "by an irrevocable covenant [foedus]" brings out the continuity between the founding moment and the relationship that is established, for the term "covenant" evokes the content of both the fact of establishing the alliance and the relationship established by the fact. On the one hand, the "alliance" refers to the pact and its consensual origin, but it cannot be identified with the "act of the will," for the proper meaning of the text differentiates the two, by an act of the will "a man and a woman by an irrevocable covenant mutually give and accept one another." Thus we can say that on the other hand the "covenant" also refers to the *manner* in which the wills are united to originate the binding relationship. At the same time, the word "covenant" evokes the expression of c. 1055, which justly begins by speaking of the "*matrimoniale foedus*" (see commentary on c. 1055).

8. *Irrevocability of consent*

The term "irrevocable" evidently refers to the act of will which constitutes matrimonial consent. But it goes farther, for it appears in the text directly linked as an adjective to the word "covenant." There it can be seen that not only would it be ineffective to revoke consensual will, but

the *manner* of establishing marriage is also not revocable, which is giving and accepting one another, man and woman, mutually by *covenant*, "as a single principle."

9. *Consent in the context of the canonical matrimonial system*

In conclusion we may place this canon within the general framework of the matrimonial system and indicate its principal relationship with the canons that affect it or are affected by it in any way. With respect to the itinerary of the parties up to the time of marriage, the following should especially be taken into consideration: the right to contract (cc. 219, 1058), the nature and effect of betrothal or engagement (c. 1062), and preparation for marriage and the agents involved (c. 1063). With respect to the specific conditions for *celebrating* marriage, the regulations on impediments (cc. 1073, 1083–1094), and the need for the correct form (c. 1108), must be taken into account. As far as *consent* is more directly concerned, the canons that correspond to a possible defect or fault (cc. 1095–1099; 1101–1103), the relationship between matrimonial will and knowledge of the nullity of the marriage being attempted (c. 1100), the need to manifest consensual will in an adequate manner, and the characteristics thereof (c. 1104), and the possibility of contracting marriage through an interpreter (c. 1106) must also be kept in mind. Finally, after a *marriage has been celebrated*, its effects must be considered (c. 1134), together with the presumption of the persistence of consent (1107) and the possible forms of validation (simple: cc. 1156–1159) and retroactive validation (1161–1163).

1058 Omnes possunt matrimonium contrahere, qui iure non prohibentur.

All can contract marriage who are not prohibited by law.

SOURCES: c. 1035; SCHO Resp., 27 ian. 1949; SCHO Resp., 22 dec. 1949; IOANNES PP. XXIII, Enc. *Pacem in terris*, 11 apr. 1963, I (*AAS* 55 [1963] 259–269)

CROSS REFERENCES: cc. 219, 226, 1062, 1055, 1057, 1059–1060, 1063, 1065–1067, 1073, 1075–1077, 1083–1094, 1095–1104, 1108, 1124, 1134–1137, 1151

COMMENTARY

Juan Ignacio Bañares

1. *"Ius connubii" in CIC*/1917

Although the text of this canon literally reads the same as c. 1035 of *CIC*/1917, the change of placement is significant. In *CIC*/1917 this canon opened the chapter on impediments in general, *ius connubii* was thus shown as a "principle" and it was clear that regulation of impediments was exceptional and to be interpreted restrictively. That is how the *coetus* of consultors who worked on the reform of these canons appeared to see it at first; they rejected the suggestion to move the canon to its present position, together with the preliminary canons.[1] *Ius connubii* has in fact commonly been treated that way, along with impediments, and it indicated a person's right. In the end, perhaps that context was an inadequate framework for stating a right of such depth and personal and social magnitude. It is true that the canon could give the impression that it was simply a way to begin the treatment of impediments, as if they were the "substance" of the canonical norm. Yet it is also true that the regulations on impediments do not include all the norms on the validity of marriage and consequently on the conditions for exercising the right to contract marriage. Norms referring to consent and form, for example, have to do with the expression "qui iure non prohibentur."

1. Cf. *Comm.* 9 (1977), p. 132.

2. *The position of "ius connubii" in CIC*

This canon was moved to the first part of the title "Marriage," together with the other general canons. It was excised from the particular norms on impediments and placed in the context of the subjects of a conjugal relationship. Here it is more obvious that a person's right needs to be taken into account throughout the entire arrangement of the canonical marriage system. In addition, the role of this right as a principle in interpreting any fact or aspect of marriage is also brought out.

Nevertheless, there is still a question as to whether the place and manner of presenting this right is the best. If it is fundamental and personal, one also wonders whether the *faithful* have a fundamental right to contract marriage. If so, what would the foundation and particular content be, and what would its relationship be with the natural right to marry. If *ius connubii* is truly a fundamental right, perhaps it would be better placed with the canons that refer to fundamental rights (208–223).

3. *"Ius connubii" expressed as a fundamental right*

Canon 219 establishes that "all Christ's faithful have the right to immunity from any kind of coercion in choosing a state of life." Therefore, the proper place for the canonical expression of *ius connubii* is in that canon, for it is included in the expression "state of life." Treating access to marriage and other "states of life" in the ecclesial community all together under fundamental rights has the advantage of fully accounting for recent magisterial teaching on the significance of personal commitment and the ways it can be achieved. Such treatment connects marriage with apostolic celibacy and replaces the contrary or minimalist vision of some extremists. And finally, it more naturally indicates that the "state of married life" is *one* of the "states" there are in the Church, with its particular function in Church life (cf. c. 226, where this idea is developed). Because it is too general, however, the terms of the statement are perhaps a rather poor expression of one of the fundamental rights of the faithful, a right that is not precisely named, although probably contained therein. Furthermore, it can be criticized for its content, which seems somewhat reductive, since *ius connubii* is more than "the right to immunity from any kind of coercion." In any case, c. 219 and c. 226 to a certain degree fundamentally support the statement in c. 1058. We can therefore say that this canon *specifies* a fundamental right referring to the subject of marriage. As we have previously indicated, its functional rationale would be that it is presented as one of the principles giving shape to the whole canonical marriage system.

4. *Right and expression or exercise of the right*

a) *Positive law and "ius connubii"*

The statement in the canon that "all can contract marriage who are not prohibited by law" does not seem very positive and seems too closely linked to the norm of law. It is true that in the light of the canons we cited, it is understood that the foundation of the right lies in the person of the faithful and in his nature as such. But it is no less true that the text of the Code as cited *appears* not only to restrict a person's right, but that it is the legislator, according to the norm, who is establishing and granting the right. If formally, from the point of view of positive law, the expression used has the advantage of being broad and general, from the substantive point of view, it does not seem to be a happy choice with respect to the objective foundation of *ius connubii.*

b) *When does "ius connubii" begin?*

This question is one of the reasons why we need to distinguish two different realities that may cause misinterpretation. As a fundamental right of a person, the right to contract marriage is inherent, permanent and cannot be waived, for no one can stop being what they are. *Exercising* the right, putting it into practice, is another matter, which is lawfully subject to regulation, including regulation based on its nature, and that is the job of the legislator. It seems rather vague to say that anyone who cannot contract marriage validly "has" no *ius connubii.* Can we say that a male "receives" this right when he reaches fourteen years of age and that up until then he does not have it? Can we say that someone who is intoxicated or asleep "loses" *ius connubii* during that period of time and regains it each time he recovers a state of consciousness? Can we say that *ius connubii,* as a personal right, depends upon positive regulation of condition, abduction or legal adoption, and that its content varies as regulation changes? And can it be definitively stated that *ius connubii* is received as something that is "granted" by the juridical order, civil or canon? It seems logical that the right to marry as a fundamental human right should be born and die with the person, and as a fundamental right of the faithful, it should properly be born with baptism (we shall return to this subject).

c) *"Ius connubii" and the marriage system*

In my opinion the differentiation between the right itself and specifically exercising it is not trivial. At the natural level, the foundation of the right lies in a person's condition. The object and content of the right are indicated by nature, and its limits also arise from its definition. Thus we can say that in reality, *ius connubii* is the basic element that establishes and also requires the whole system of normative regulation on marriage and family. In that sense the path would be the opposite of the path usually taken. It is not a fundamental right that is restricted by society for the common good; it is a fundamental right with its own limits and also at the

same time a right that *requires* specific regulation to be effective in the social environment, because it is itself an important part of the common good. "*Ius connubii* is a juridical situation that is inherent in a person (a natural right) as a dimension of the legal situation that comes about because marriage is the primary manifestation of human nature individualized in a person insofar as a person is basically sociable."[2]

From that point of view, the various elements of any marriage system would indicate the proper limitations on exercising or setting forth the right to marry so it could be operative in each historical and cultural context either at the level of natural law or as specified by the legislator. But the elements would always have the purpose of recognizing and protecting *ius connubii*, and they would definitely be required by its very nature.[3] Thus impediments would indicate when a person was not in condition to *exercise* the right to marry, precisely due to his or her situation at a given moment as a person, or due to the lack of proportion or appropriateness between the person's state at the time and the nature of the act that originates conjugal union. While there is always in every person a *juridical capability* to contract marriage, a person does not always have the *capability to operate* with respect to this fundamental right.

5. *"Ius connubii" and impediments*

With regard to *impediments*: *a)* The impediment of bond is determined and required by the condition of being a spouse, and by the very nature of marriage it disqualifies a person from establishing a second bond while the first endures. These are incompatible juridical situations under natural law. Only the legislator can, and should, recognize the incompatibility and deal with it in the legal system. *b)* The basis for the impediments of consanguinity and age is also supported in natural law and is required by the nature of marriage. The impediment of consanguinity is protection for an existing marriage and for the specific relationships that make a family. The impediment of age is due to the need to specify the moment at which the capability of entering into marriage may be operative. *c)* The purpose of the impediments of abduction, crime, public propriety and consanguinity derived from legal adoption is to protect the itinerary of forming the matrimonial act of will and the "sacred" nature (in the *natural* sense of the word) of the marriage bond, and to protect against certain types of manipulation or abuse. *d)* Within the Church's specific regulations *for the faithful as such* there are impediments of disparity of cult, sacred orders and vows. The disparity of cult concerns a common good of

2. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III: *Derecho Matrimonial, 1* (Pamplona 1973), pp. 315–316.
3. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, V (Rome 1946), p. 63.

a higher order, faith itself. The other two refer to special limited juridical situations in the ecclesial environment, prepared specifically and over a long period of time, and assumed with guarantees of maturity and liberty. They are juridical situations that during their effective life are incompatible per se with establishing a marriage bond.

6. *"Ius connubii" and form*

An explanation is required with regard to *form*. Juridical form as a way of manifesting the giving of consent and as a way for society to accept it and recognize it effectively is in itself a normal requirement of *ius connubii*. Because of the role that marriage plays in the common good, society has an interest in knowing when a marriage bond has been established between two of its members. Also, the contracting parties have the right to have society admit and recognize their union. As a consequence, their union receives the effects derived from the legality of the union, for example, in matters of relationship, protection of the bond, inheritances, and so forth. Since in society a marriage implies certain consequences due it from a strictly legal angle, a point of support is needed to facilitate juridical certainty for the parties and for the marriage system, for everything depends upon who is to marry and who is already married, (in appearance, at least). It is vital to know who is married and to whom, and who is not. Thus simultaneous consent must be given unequivocally and perceptibly by the contracting parties, and its manifestation must be accepted by proper witnesses.

For the faithful, marriage is also a sacrament. It grants grace, which signifies and establishes the spouses as a sign of Christ's exclusive and fertile union with his Church, and it opens up to them a specific panorama through the peculiar mission they fulfill in the people of God. Hence, normally, the *juridical* form regulated by the legislator requires that marriage be celebrated in a liturgical ceremony of the cult (cf. c. 1119) and if possible, it is best celebrated within the Eucharistic sacrifice.

7. *"Ius connubii" and consent*

With regard to *consent*, the nature of *ius connubii* requires that the founding act of marriage be voluntary. The legislator alone, therefore, can and must admit the principle of consensuality, channel it and protect it, but he cannot add to nor subtract from the minimum naturally required for consent (see commentary on c. 1057). From the natural point of view, the minimum is to ensure that the contracting parties are persons capable of freely performing a human act for the purpose of the commitment they are making. It is also meant to adequately protect the act of consent in the

path leading up to it, as well as in the circumstances of giving and receiving it; and to ensure that what is expressed corresponds to or suffices for the objective content of the marriage covenant. In addition, on the subject of impediments, if, because of the condition of the faithful, the Church can establish some impediments to defend specific spiritual goods. For consent, however, no specific regulation derived from the supernatural level is required, because consent is the same for everyone. If one of the contracting parties were baptized and were to reject the sacramental dignity to the point of positively extinguishing the will to marry under the circumstances, only then would there be an impediment for establishing the bond because a juridical relationship, which is from natural law, cannot arise between baptized persons except through the modality of the sacrament.

8. *The content of "ius connubii" as a person's fundamental right*

Although it may seem obvious, we must begin by stressing that the right to enter into marriage means a person's right "to enter into *marriage*." The repetition is intended to express the idea that this is not a "right to use the body," or a "right to indulge in sexual freedom," or a "right to express sexuality in every possible way." It does not refer to freedom of conscience in the State, or to freedom of thought, or freedom of action in private. What it is, is a dimension of the justice system that involves a person's ontic structure as a woman and as a man with reference to participation and possible communion in achieving the ends to which union is intended. Other types of "sexual behavior in couples" or in a different number of persons, could be discussed, and the appropriateness of civil law in attributing specific, positive or restrictive attributes to them. With reference to the reality of a person and the structure of conjugal love, however, it is not appropriate to treat various realities in the same way, or to reduce marriage to "one possible way to use sexuality," as if it did not have its own characteristics and ends.

In addition, from what has been said above, it can be seen that the object of *ius connubii* includes more than the right to enter into marriage, or, if you will, the right to marry involves various elements. We have already seen that before *ius connubii* can be exercised normally, as a *previous given* it requires a form, a capability on the part of the contracting parties and an adequate manifestation of the foundational act of the marriage relationship. For the strict content of the right, the following elements may be pointed out: *a)* freedom to enter into marriage or not; *b)* freedom to choose mutually the person with whom one wishes to enter into marriage; *c)* the right to recognition and adequate protection of the contracted bond and the effects derived from the legal relationship established thereby; *d)* the right to protection and necessary help in conjugal and family life; and *e)* the right to a just decision in conjugal conflict,

when facing possible separation, or in reference to the validity of the bond (cause of nullity). Of these five juridical aspects, it can be said that *ius connubii* contains the first three directly and immediately, and it serves as the consequential foundation of the other two, as they more strictly arise from the bond that has been contracted. In fact, we could say that there is no thread of continuity between the right to marry and marital rights—for the spouses as spouses; marital rights are derived from the bond and would be the natural extension of the right to establish the bond, after it has been placed in practice. Marital rights also are a part of the expression of the *ius connubii* that forms the basis of, and requires a just matrimonial system founded on the juridical system.

9. *"Ius connubii" as a fundamental right of the faithful*

The fact that a marriage entered into between two baptized persons is raised to the category of sacrament does not alter or modify the substance of marriage; it rather enables an unexpected supernatural potential to be realized, for no one "has the right" to signify the union of Christ with the Church, or to give grace, build up the Church as the people of God, etc.

The sacramental dignity of marriage, however, the fact that the contracting parties are baptized, *modalizes* a person's right to enter into marriage without substantively changing the right. Speaking of the *right of a member of the faithful as such,* we need to point out the following elements: *a)* freedom to choose the state of conjugal life or not as a vocational path; *b)* freedom to choose one's partner, considering that the partner will necessarily become a part of the divine plan for the salvation of both of them and of others; and that points to the specifically Christian responsibility for the event and to the Church's responsibility in early and proximate preparation for marriage (cf. c. 1063); *c)* the right to recognition and protection by and within the Church of the bond entered into and the effects derived therefrom; *d)* the right to the necessary protection and help for a proper and fully Christian conjugal and family life that satisfactorily meets the universal call to sanctity through personal circumstances; and *e)* the right to a just decision in case of conjugal conflict, if separation is contemplated, or regarding the validity of the bond (cause for nullity), so as to learn about and live the obligations of the married state in the context of the vocation. In other words, it is the same objective content, but seen in a different *formality,* where the spouses are raised to the supernatural level of children of God, and their marriage is consequently introduced into the role of the salvific economics of the sacraments[4]. The proper object of this formality is not, so to speak, marriage itself, but

4. Cf. J.I. BAÑARES, "El 'ius connubii', ¿derecho fundamental del fiel?" in *Fidelium Iura* 3 (1993), pp. 233–261.

through the condition of spouses, carrying out the relationship with God that consists of various virtues (most especially *charitas*), depending on the specific *vocation* of each member of the people of God (cf. c. 1063).

Consequently, the Church has a correlative duty: *a)* to attend to and prepare its members to take this vocational path; *b)* to defend and spread the truth about marriage as an integral part of society's common good and the Church's supernatural common good; *c)* to support the faithful so they may overcome any difficulties encountered and obtain from their married and family life the due spiritual and missionary returns; *d)* to respond justly to complaints that impugn the validity of a marriage or to petitions that a marriage needs to be recognized after it has been impugned. The first two duties refer to the total communication of natural content and the Church's supernatural doctrine on questions relating to faith and morality with respect to marriage and family. The third duty requires facilitating all necessary means to married members of the faithful for developing their Christian life and ecclesial mission to the fullest degree. The last duty requires that the hierarchy provide adequate means so that justice can be applied *in casu* diligently, competently, and with certainty, sensitivity and supernatural meaning.

10. *The natural right to marry and the fundamental right of the faithful*

As we have seen, the object of the right is the same in both cases. It is simply that in the case of the faithful there is a typical modalization that does not exclude the natural right but projects it onto the supernatural plane of being and operating as children of God because the persons who possess the right are children of God. The foundation of the natural right lies in a person's dignity, depending on his or her ontological structure and considered from the dynamic perspective of the structure because it is uniquely singular. The foundation of the right of a member of the faithful is supported by the individual's condition as a member of the ecclesial community, which, as is obvious, does not nullify one's condition as a person. Thus, just as such a person is a child of God, similarly a sacramental marriage is nothing other than marriage entered into by two people who are children of God. A member of the faithful's right to contract marriage is nothing other than a person's natural right raised to a filial condition with respect to God. The *res* (the subjects and the relationship between them) is unique; the distinction between the two rights is real, but well-founded. Thus the dimensions of justice are different on the natural level and the supernatural level. Nothing is added to a Christian, but a Christian lives the same reality contemplated and lived under the values of faith and with the force of faith.

1059 **Matrimonium catholicorum, etsi una tantum pars sit catholica, regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus.**

The marriage of catholics, even if only one party is a catholic, is governed not only by divine law but also by canon law, without prejudice to the competence of the civil authority in respect of the merely civil effects of the marriage.

SOURCES: c. 1016; *CC* 577–583; *UR* 16

CROSS REFERENCES: —

COMMENTARY

Juan Ignacio Bañares

This canon is the definitive treatment of the Church's jurisdiction in the matter of marriage, its object and its subjects, in relation to the competence of civil systems.

I. JURISDICTION

As for *jurisdiction*, it is understood that the Church has proper, original and primary sovereignty, proper because its sovereignty is specific, corresponding to requirements of its own nature, It is original, because it need not be granted and does not depend upon external recognition. It is primary because within its system, at the level of the economy of salvation, it is the first social manifestation of the relationship between God and the human person.

1. *Foundation*

The *foundation*, and the existence derived from it, of jurisdiction comes directly and exclusively from the founding will of Jesus Christ. It gives the Church true liberty "as the spiritual authority appointed by Christ the Lord with the duty, imposed by divine command, of going into the whole world and preaching the Gospel to every creature" (*DH* 13).

Since God is the author and Lord of both the natural order and the order of grace, there can be no objection, from the point of view of reason, to His direct intervention in the history of mankind. From that it follows that the Church's foundation is as consistent and solid as the foundation of all of created reality, being the will of the Creator. It also follows that in comparison with other social phenomena the Church has the right to govern itself and to direct itself to human beings through means adequate to achieve its purpose.

2. *Recognition by other juridical systems*

Because of the current cultural situation of ideological and religious pluralism, and the manifestations of the people's political power, this title and foundation is not universally recognized at the present time. Whether to avoid having to recognize another original form of social authority or to avoid having to admit a clearly religious fact in a historical context full of contradictory differences and positions, States frequently prefer to recognize the Church strictly under positive law; that means respecting the Church as a proper entity under international law or considering it as a manifestation of the social dimension of religion.[1]

The Church accepts the framework of international law as a valid support for its dialogue with States. And where that support is not recognized, the Church even accepts the framework of internal regulation of religious confessions by States, as long as they respect the minimal liberty that "is the fundamental principle governing relations between the Church and public authorities and the whole civil order" (*DH* 13). For that reason, in the context of positive law, "The Church claims freedom for herself in human society and before every public authority. The Church also claims freedom for herself as a society of men with the right to live in civil society in accordance with the demands of the Christian faith" (*ibid.*). In such an environment, the Church proclaims that an authentic right to religious freedom suffices for its required independence.

3. *The State and the principle of religious freedom*

The principle of religious freedom is based on human dignity and the recognition of a person's spiritual riches and the legitimate autonomy of the social dimension as a part of the good of all human society (cf. *DH* 2, 9, 15).

1. Cf. A. DE FUENMAYOR, *La libertad religiosa* (Pamplona 1974), pp. 43–44, 47, 178–182.

The State must recognize regulation of the religious dimension of human beings by religious confessions "because religious communities are a requirement of the nature of man and of religion itself" (*DH* 4); and it must do so considering the religious dimension and the regulation thereof as a contribution to the universal good, for the religious dimension of the person is none other than a phenomenon of one's openness to transcendency (cf. *DH* 6,3). The conciliar declaration states, "Among those things which pertain to the good of the Church and indeed to the good of society here on earth, things which must everywhere and at all times be safeguarded and defended from all harm, the most outstanding is that the Church enjoy that freedom of action which her responsibility for the salvation of men requires" (*DH* 13).

With regard to regulating the right to religious freedom, all citizens and all lawful manifestations of religion must be treated equally, as far as individuals are concerned. As for the different religions or religious confessions, States must heed the nature of each so as to properly respect the means used. Not all religions or religious confessions give the same importance to the same phenomena, nor do they take care to regulate them to the same degree. "Also included in the right to religious freedom is the right of religious groups not to be prevented from freely demonstrating the special value of their teaching for the organization of society and the inspiration of all human activity" (*DH* 4).

4. *The particular nature of canonical marriage*

There is no doubt that marriage is a natural reality of the first order. It originates in society and causes effects in society. It is a social reality that includes a good with great repercussion in the vital context of all of society. For any given society, marriage is a part of its heritage, not only the historic or cultural heritage, but also a dynamic heritage that has a permanent influence on society and in varying senses builds up society. The road to the institution of marriage, the very fact that it was founded, its existential development and its end are thus shown to be social realities of the first magnitude.

When the *ius connubii* is considered in a civil society in which the Catholic faithful live, it is not simply a question of demanding recognition of a *religious form* of celebration, of an initial religious rite. The issue lies in the fact that for the Church, the marital state forms a primordial and constitutive part of its very existence and ecclesial task, of the very existence and work of the children of God. It is not a matter such as age, sex or profession; marriage and family establish a reality inherent in the subject, for it is a "constitutive relational reality." Each spouse is married to the other spouse and has come to be so by realizing a potential found in the structure of their persona and in their baptized persona. This is true not

only when the marriage is sacramental, but also by the mere fact that a member of the faithful comes to the condition of being a spouse. Thus it seems to me insufficient to found the Church's jurisdiction in this matter solely on the sacramental dignity of marriage.

When we are speaking of the relations between the Church and State in matters of marriage, the peculiarity and richness of the way in which the Catholic Church regards marriage demands a treatment that is adapted to its nature and purpose. Returning to the ideas initially expressed, we could say that the Church can certainly claim for itself jurisdiction over the legal dimension inherent in the *ius connubii* of its faithful as a requirement of the sovereignty and international recognition enjoyed by the Church. We can surely also defend jurisdiction with the principle of religious freedom, for the faithful can justly claim the development of their right to enter into marriage completely in accord with their faith. Their marriage is complete only when canonical marriage is accepted not merely as a *modus celebrandi*, but as the product of a proper and complete marriage system. Additionally, as we have seen, the way marriage is considered by the Church and her faithful demands full respect of the autonomous configuration of its juridical system, for it deeply affects the lives of both precisely in the area it claims to govern—religion.

Since acceptance of the canonical marriage system does not harmfully affect the "just public order" of society, it is difficult to understand how it could be rejected for reasons outside ideology. Yet it is easy to understand that such rejection could not take place without causing harm to the Church's original system and to the *ius connubii* belonging to the Church's faithful as citizens of a State. The fact that different realities are treated differently is not discrimination, but to equate in law things that are not equal is to do justice a wrong. In the context of the Church's sovereignty and in the context of the principle of religious freedom, the *ius connubii* must be looked at from *the point of view of the marriage offered by the faith*, and it must also be respected. Faith indicates that it is the reality of marriage that has been raised to a supernatural level and incorporated in the salvific designs of God. Therefore the faithful and the Church can justly claim that this jurisdiction be recognized.

II. THE MATTER OF MARRIAGE

Because marriage is an institution rooted in the proper structure of the human sexual person, the inner order of a person defines and organizes the structure of a marital relationship: its cause, essence, properties and ends. These elements of rational order that are found in man and woman express the divine design (natural-divine law) of marital union. Consequently these elements: *a)* affect all marriages regardless of who the

parties are, regardless of the juridical system under which the marriage is contracted, regardless of the way it is celebrated. *b)* They always influence the validity or nullity of the marriage covenant and there can be no substitution for or dispensation from them. *c)* Consequently, every marriage system, in positively regulating *ius connubii* and how it is exercised, should include these elements. They should be positivized in some way within the limits of the primary system. Norms that are exclusively positive may be added, provided that there is a rational proportion and the norms do not essentially contradict the primary system. Every juridical system on marriage should include natural-divine law, but may also include at the same time those things that are strictly of a positive character. The subjects of the system will be subject to all the norms in either environment. That is why the text of the Code says, "The marriage of Catholics ... is governed not only by divine law but also by canon law."

The content of the matter regulated by canon law on marriage definitely refers to the norms needed for an adequate implementation of the *ius connubii* as a human right and a fundamental right of the faithful. These include the right to choose the condition of being married and to choose one's spouse; recognition of the marriage bond and its effects; protection and help for family life; and the possibility of applying the law in cases of nullity or situations of separation (see commentary on c. 1058).

III. THE SUBJECTS

"The marriage of baptized persons" was subject to canon law according to c. 1016 of *CIC*/1917. That expression included all Christians, but it was not so clear as to whether it sufficed for one of the spouses to be validly baptized for the marriage to be governed by the law of the Church, even if married to a non-baptized person. In accordance with the impulse given to ecumenism by Vatican Council II (cf. *UR* 16), the current text of the Code indicates that any person entering into marriage with a member of the Catholic faithful is subject to canon law, even persons who are not Catholic or who are not baptized. The reason is the importance of marriage and the married condition for all of ecclesial society and for each member of the faithful, as we have noted (see *supra*, I). Another reason is that although there are two contracting parties, a marriage is made with a single (dual) consent and becomes a single bond. For a Catholic, with reference to faith and Christian life, there is a difference between being married and not married. The relationship between spouses and, if applicable, parenthood, shapes the Christian vocation, which is defined by specific duties and tasks within the family, in the Church and in the civil society to which the spouses belong. The text of c. 1960 of *CIC*/1917, which indicated that it was an ecclesiastical judge's exclusive right to

hear "matrimonial cases *inter baptizatos*," was modified for the current c. 1671 to refer to matrimonial cases "*baptizatorum* ..." of the baptized. However, it can be said of any marriage, including a natural marriage, that it contains a *quid sacrum*, not only in the sense that it tends by law to be converted to a sacrament, just as any person is called be become fully and effectively a child of God *in Ecclesia*, but also because it is understood that a natural marriage ipso facto becomes a sacrament when the non-baptized spouse receives grace through baptism.

For those reasons the Church also claims jurisdiction over a non-sacramental marriage (a Catholic with a non-baptized person); the Church has a duty to protect the faith of its faithful, and the development of that faith. Indeed, the authority of the Roman Pontiff may also intervene (and that has occurred in some cases) in matrimonial cases between the non-baptized, even if neither of them intended to receive baptism, if one of them later married a faithful Catholic, provided that the non-baptized person was willing to respect the faith of the Catholic and to educate the children in the faith of the Church. And, when it is a sacramental marriage, the Church is entitled to jurisdiction by right of the *salus animarum* and by the exclusive and excluding power of the Church over the sacraments, strengthened by the fact that the marital covenant and the sacrament are one and the same (see commentaries to cc. 1055 and 1056).

1. *Juridical order and the constitutive moment of marriage*

It is useful to distinguish between the legislative (and/or administrative) moment that establishes the conditions needed to enter into marriage, and the judicial (and/or administrative) moment that operates on marriages, at least apparent marriages, that have already been entered into. With respect to the norms for *constituting* marriage, non-baptized persons are governed by civil or religious law or by lawful custom when the parties marry themselves.[2] Non-Catholic Christians who marry each other are governed by the juridical system of their religious community, or, if none or by remission of law, by the civil law system.

a) *Non-baptized persons*

Non-baptized persons who marry a Catholic must do so according to the law of the Church with respect to the act of contracting regarding both what is referred to as the form of marriage and with respect to the relationship formed by matrimonial consent, for marriage is unique (even though dual in origin, as we have previously said). As for the prior

2. Cf. TH.M. VLAMING (L. BENDER), *Praelectiones Iuris Matrimonii*, 4th ed. (Bussum 1950), pp. 60–63; cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, V (Rome 1946), pp. 87–97; cf. P. GASPARRI, *Tractatus Canonicus de Matrimonio*, I (Typis polyglottis Vaticanis 1932), pp. 38, 146–161.

capability of a non-baptized person to enter into a valid marriage, most authors, including Gasparri, state that the Church has no jurisdiction over a non-baptized person, and that the norms of the system to which such a person belongs should be followed in all respects that are not contrary to natural law. According to this opinion, a non-baptized party who enters into canonical marriage with a faithful Catholic would not be subject to the impediments of positive law in Church order. That would be the case when the impediments are absolute, when they affect the party regardless of whom he or she marries. Otherwise the non-baptized party would be subject to the civil system, for example, the impediment of age and its dispensation, the impediment of abduction, the impediment of killing one's spouse or of consanguinity, even though they are from positive law (the impediment of consanguinity, only in some of its degrees). However, because of their relative nature (they arise only in the case of certain relationships between the specific parties), it seems sufficient for one of the parties to be Catholic for the impediments to affect a marriage that has been celebrated.

b) *Baptized non-Catholics*

In this canon baptized non-Catholics who enter into marriage with a faithful Catholic are not distinguished from the non-baptized. However, there is a difference. Because of valid baptism and because of the sacrament, the Church's jurisdiction as a principle includes all Christians. But, the legislator has expressly established in the Code that "merely ecclesiastical laws bind those who were baptized in the Catholic Church or received into it" (c. 11). Therefore, when c. 1059 states that marriage for Catholics is governed by canon law even if one of the parties is not Catholic, it is establishing an exception to c. 11 and, in the case of Christians, using its original jurisdiction. Thus, in a marriage between a faithful Catholic and a Christian of a different religious confession, all norms of canon law would be effective, including the impediments of positive law, because both baptism and the sacramental dignity of marriage place in the act the potential exercise of the Church's jurisdiction over both parties.

In fact, during the reform of the Code, a paragraph was considered that was expressly devoted to non-Catholic baptized persons. It would have indicated that their marriage was governed by divine law and the religious or civil law governing their religious confession, or other words to the same effect. Some consultors in the *coetus* deemed the reference necessary, otherwise those marriages would be governed solely by divine law. Others were opposed, alleging ecumenical reasons, the risk of expressly recognizing the jurisdiction of other ecclesial communities and the lack of an urgent need to fill this juridical lacuna, for those marriages are governed by divine law and customary law.[3]

3. Cf. *Comm.* 9 (1977), p. 127.

c) *Special cases*

Finally, there are some cases that might cause uncertainty. These would be some instances where the Code permits a different form from what is provided in the law, or makes an exemption from the formal requirement. The first doubt relates to the possibility of a valid marriage between a Catholic and a non-Catholic of the Eastern rite. In that case, "the canonical form of marriage is to be observed for lawfulness only," although the intervention of a sacred minister is required for validity "while observing the other requirements of law" (c. 1127 § 1). Does this mean that we have merely a "canonization of a different *form* of celebration," as in the case of § 2 of the canon, or is it a real assumption of the juridical marriage system in the non-Catholic Eastern Church? Because the law of the Eastern Church is not specifically referenced, the legislator is referring to proper law, therefore limiting the issue as to the form of celebration, and giving a reminder of the force and requirement, even in these instances, of the usual conditions for validity. Consequently, a marriage entered into by a Catholic and a non-Catholic of an Eastern Church, following the form of that Church, could be valid even though some condition for validity according to the law of the Eastern Church might be lacking, provided that the conditions for validity in canon law had been fulfilled.

A second special case refers to a person baptized in the Catholic Church or received therein who later leaves the Church by a formal act. In that case, the *CIC* expressly indicates *a)* that there is no impediment to entering into marriage with a non-baptized person (c. 1086 § 1); *b)* that there is no prohibition against entering into marriage with a baptized person non-Catholic (c. 1124); and *c)* that canonical form is not obligatory (c. 1117). However, in c. 1059 the Church does not free the parties from being subject to the norms on marriage. Could it be that, although they are dispensed from the form and obstacles to marrying a non-Catholic, the Church claims they are still subject to the other marriage norms in canon law? Would the impediments be enforceable against them if they entered into marriage with a non-Catholic? Or does it mean that their marriage should be governed by the civil or religious system that they belong to, and that they would remain totally outside the canon law marriage system (but still within natural law, which governs all systems)?

It may seem that when the law states that some specific precepts are not obligatory (cc. 1086 § 1, 1124 and 1117, previously cited), it suggests that all the others are obligatory. Yet it does not seem reasonable that the legislator should not obligate certain subjects, (subjects formally excepted), with reference to disparity of cult, mixed marriages and canonical form, and intend at the same time to keep them subject to the remainder of the matrimonial system. If, however, the legislator's intention seems to be for a person who has ceased to consider himself Catholic, since it would be difficult for that person to have access to the Church (to seek a dispensation or permission, or to celebrate marriage canonically),

to avoid pitfalls or difficulties in exercising the *ius connubii*, then it is reasonable to think that in the *mens legislatoris* there was no intention to reserve jurisdiction over the marriage of such a person. Curiously enough, the Church itself exempts the parties from obligation precisely in the most serious instances, such as disparity of cult or the requirement of form, this seems to suggest that if the more important item is granted, the lesser item is included. And so perhaps we may conclude that basically this is not a situation of dispensation *a iure* in three specific instances, but rather a true exemption from the jurisdiction of canon law on marriage. It would have been clearer if the exception of a person who has left the Church by formal act had been included in this canon.

2. *Juridical order and judicial moment*

With respect to the Church's jurisdiction in judicial matters, it is important to remember the principle established in c. 1671 when it states that "matrimonial cases of the baptized belong by their own right to the ecclesiastical judge." According to that text and what we have said so far, the following criteria may perhaps be established: *a)* The Church has direct jurisdiction to judge the marriage of any of her faithful because of their condition as faithful, because the *ius connubii* as a fundamental right of the faithful, may demand the administration of justice *in casu*; because of the *cura animarum* as the first responsibility of the Church; because of the effects of marriage on family and any children; and for the social repercussions of marriage. *b)* To those reasons we may add the sacramentality of marriage when it is celebrated between two baptized persons. *c)* Because of the sacramental dignity of marriage, the Church can know by direct jurisdiction the nullity or the validity of marriage celebrated between two Christians, even if neither is Catholic, although it does not usually exercise this jurisdiction unless one of the parties wishes to be received into the Catholic Church or wishes to marry a Catholic, (by virtue of the connection of the case with the *salus animarum* of one of its faithful). *d)* Regarding the marriage of a non-baptized person to another non-baptized person or to a non-Catholic Christian, there are three principal foundations, previously noted, for the Church to hear a case. Because of the *matter* there would be a related foundation based on natural content, and the Church has always had the right to interpret it,[4] and on the legal potential of any marriage to become a sacrament through the baptism of the spouses. Because of the *subjects* there would be an indirect but immediate foundation if there was a connection with the *salus animarum* of any of her faithful,[5] as in the preceding paragraph. In those cases also the Church has an interest in being reassured about the "state

4. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, III (Turin-Rome 1949), p. 410.
5. Cf. F.X. WERNZ- P. VIDAL, *Ius Canonicum*, V (Rome 1946), p. 78.

of freedom" of the non-Catholic party, and consequently, in having moral certainty about the sufficiency of a possible nullity of the previous bond under the principles of natural law or, if applicable, divine-positive law. Thus the Church would not judge those cases unless they had some relationship with the marital situation (or an irregularity) of a Catholic faithful, in other words, the Church would judge them only when it was necessary to know something about the situation of a Church member. And indeed, there are no known precedents for the Church's intervention in natural marriages where there is no connection with one of her faithful. *e)* With regard to someone who has formally defected from the Church and has married a non-Catholic, again the question could be raised about exemption from jurisdiction in matrimonial matters. It appears correct to understand that the nullity of that marriage should be heard by the civil or religious system under which the marriage was entered into, except for specific situations with some connection to a Catholic person.

A different and interesting question, although it does not belong here, is what procedural and substantive norms should be used when hearing cases of marriage entered into between non-Catholics. With respect to procedural norms, see cc. 1476 and 1671, and the Signatura Decree of May 28, 1993.[6] As for the substantive norms, there is a clear possibility of judging matters concerning natural law. That is the interpretation that seems should be made of the CPI Response of April 23, 1987, which states that the defect treated in c. 1103 may be applied to the marriage of non-Catholics.[7] The difficulty arises when there must be sufficient certainty to apply natural law *in recto* to a specific case or to discover which canons of the *CIC* strictly include principles of natural law so they may be directly applied, or to know whether the Church could judge a marriage between non-Catholics that had been declared null because it contravened any of the lawful requirements of positive law established for validity by the civil or religious system under which marriage had been entered into (for example, for a defect of substance in the established form that nevertheless did not contravene the principles of natural law).

IV. CIVIL JURISDICTION

The Church has never denied the jurisdiction of civil law over marriage, within the limits of natural law. Civil law may and should establish a just marriage system with norms that adequately determine and protect

6. The bilingual text of the Decree and a brief commentary can be found in the article by R. RODRÍGUEZ-OCAÑA, "Notas al decreto-declaración del Signatura: la jurisdicción eclesiástica y los matrimonios de los acatólicos," in *Ius Canonicum* 68 (1994), pp. 651–659.

7. The bilingual text of the Decree and a brief commentary can be found in a titular article, "El miedo en el matrimonio entre acatólicos (Commentario a la Respuesta de la C. P. para la Interpretación del *CIC*, del 23.IV.1987)," in *Ius Canonicum*, 59 (1990), pp. 153–162.

the content of the marriage covenant, and its constitutive and judicial moments. What the Church is doing in this canon, since it, too, has original jurisdiction and marriage forms an important part of the being and doings of the Church and her faithful, is claiming for herself primary jurisdiction over the marriage of *her* faithful. This leads to the understanding that the State's jurisdiction over marriage is subsidiary to religious jurisdiction, within the limits of natural law and the common good, when there is a specific legal system for marriage within a given religion.

In addition, in this canon the Church expressly indicates the jurisdiction of civil law over the merely civil effects of marriage. By those effects is understood all which do not directly affect its substance such as registration, dowry, the financial arrangements of the spouses, the surname of the wife and children, residence, tax status, transactions involving assets, wills, testaments and inheritances, and so forth.

1060 Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur.

Marriage enjoys the favor of law. Consequently, in doubt the validity of a marriage must be upheld until the contrary is proven.

SOURCES: c. 1014; PIUS PP. XII, Alloc., 3 oct. 1941 (*AAS* 33 [1941] 421–426); CodCom Resp. III, 26 iun. 1947 (*AAS* 39 [1947] 374)

CROSS REFERENCES: —

COMMENTARY

Juan Ignacio Bañares

1. *CIC*/1917 *and CIC*

The text of this canon has remained the same as it was in c. 1014 of *CIC*/1917,[1] even in its literal wording, except for the elimination of the final phrase that said, "salvo praescripto can. 1127." Canon 1127 was literally retained in current c. 1150, which establishes that "in a doubtful matter the privilege of the faith enjoys the favor of the law." At the end of this commentary, we shall assess the elimination.

2. *"Favor iuris" and the matrimonial order*

It is important to point out the position of this canon in the overall arrangement of the Code. It is placed at the very beginning of the title on marriage, before ch. I, where the description of the essential elements of the marriage covenant are placed (cc. 1055–1057), and the juridical principles that must shape its treatment at the constitutive and/or judicial moment (cc. 1058–1062).

From this first observation, we may understand the following: *a)* The legislator considers the establishment and/or vital development of marriage to be a particularly important value; *b)* The system gives it such value because of its immediate connection in substance to what marriage is about; *c)* This value must be understood as shaping the entire marriage

1. Cf. P. Gasparri, *Tractatus Canonicus de Matrimonio*, I (Typis polyglottis Vaticanis 1932), pp. 24–27.

juridical order, which in the *CIC* is developed next, and not only as a peculiar characteristic in the procedural treatment of causes for nullity. Hence it can be said that the *favor matrimonii* principle influences many substantive and procedural norms referring to preparation for marriage and the establishment of the marital bond and to the resolution of doubts arising about validity.[2]

3. *"Favor iuris" and "ius connubii"*

In the light of the first canons on marriage, it is clear that the specific bonding relationship is anchored in the anthropological structure of human beings considered in the sexual modalization of man and woman, and has been raised to the condition of sacrament when the marriage takes place between baptized persons. We must also emphasize the particular elements required by the tendency arising from the *inclinatio naturalis* and from the complementarity of the sexes. And we must further emphasize that this relationship can only be constituted in the mutual consent of the man and woman who give and receive each other as spouses. We must also repeat that *ius connubii* is a human right and a fundamental right of the faithful (see introduction to the title, and commentaries to cc. 1055–1058).

And finally, we could say that the entire canonical marriage system, and every marriage system under any law, should be understood as the necessary development of norms to enable full use of the right to marry that belongs to all human beings. The reason for norms on impediments, form, regulation of the act of consent or matrimonial causes, etc., is to protect and facilitate the exercise of the *ius connubii*. And that is due to the value of marriage and of human dignity.

4. *"Favor iuris" as a presumption of the law*

Favor of law with respect to marriage is, of course, stated relative to the total marriage juridical system. At the same time the legislator has also tried explicitly to specify the application of the principle to the judicial moment, when reasonable doubt persists about nullity. Although favor of law cannot be reduced to the sole presumption of the validity of the bond apparently entered into, after it has been specified in the canonical text, we do need to address comments specifically on this mention of favor of law.

2. Cf. F.R. AZNAR-GIL, *El Nuevo Derecho Matrimonial Canónico*, 2nd ed. (Salamanca 1985), p. 126.

This could be an instance of a different immediate principle derived from the general principle of favor of law: the validity of a juridical act allegedly performed in accordance with law and derived therefrom, making the burden of proof fall upon the person who seeks a declaration of nullity of the impugned act. Since in the preceding canon, however, it was joined to the principle of "matrimonium gaudet favore iuris" and since it was also joined by the particle "quare" ("quare in dubio standum est pro valore matrimonii"), it might give the impression that favor of law should be translated into "something more" than a presumption, as if a *pro nullitate* decision implied an "error in the system." Such a point of view, which would tend to raise the natural "level of requirement" of a judge's moral certainty, is necessarily false, for the Code itself states, "donec contrarium probetur." Thus this is nothing more than a *iuris tantum* presumption that a judge must remember when handing down his decision. Why then did the legislator want to present this presumption when establishing the principle of *favor iuris* for marriage? Perhaps for the importance of marriage jurisprudence to persons and to society, and to facilitate *ab initio* the unity of jurisprudence and emphasize the need for the certainty of the person judging to be based on proved facts, to avoid *a radice* the danger of giving juridical effect to a merely subjective certainty of either the parties or the judge. In fact, during the reform of the Code, when various proposals were received to eliminate or mitigate this principle, the question was sent to the Plenary Session of Cardinals, who unanimously decided to retain it.[3] That decision was the basis for rejecting a later, new suggestion coming from a Cardinal.[4]

a) *"Favor iuris" and "favor libertatis"*

It is important to dwell a little more on this point, for sometimes the question has been studied with a somewhat dialectical focus. From such a point of view, marriage tends to be seen as an institution with the parties free to form a new bond after litigation. But the legislator would be opting to protect the value of an established marriage against a hypothetical *favor libertatis* with respect to again exercising the *ius connubii.* Indeed, doctrinal voices have been raised to suggest eliminating *favor iuris* for a marriage apparently entered into, or even transforming it into the aforementioned *favor libertatis.*[5]

Even when favor of law with respect to the a prior bond is defended, arguments are frequently and perhaps excessively made from the point of view of the social values and stability of marriage, and with an attitude of wariness or suspicion toward the concrete subjects. However, perhaps we can look at the *favor matrimonii* from the point of view of the *ius*

3. Cf. *Comm.* 9 (1977), p. 128, and 10 (1978), p. 126.
4. Cf. *Relatio* 1981, pp. 246–247.
5. A brief and well-founded criticism can be found in J. FORNÉS, *Derecho matrimonial Canónico* (Madrid 1990), pp. 46–48.

connubii. The purpose of the marriage system to protect the freedom of the faithful to enter into marriage would be projected, after a marriage was established, in *in facto esse,* as protection of the act of freedom exercised by the parties. This would be not against their freedom, but as a consequence of a *favor libertatis* that, already exercised in a binding commitment, is translated into a defense of the commitment. Since the bond arises from the consent of the parties, the juridical system cannot ignore the manifested intention nor ignore the effects presumably sought when exercising the freedom to enter into marriage. Therefore, rather than a comparison between protecting the bond and protecting the freedom of the bonded persons, it would simply be a coherent development of the *ius connubii* after it was exercised according to law.

b) *Content and socio-ecclesial relevance of marriage*

This view of the matter does not detract from the arguments made from the point of view of the richness of marriage and its content, its anchor in anthropology, its theological consideration, its value as a basic social institution in the civil and ecclesial worlds.[6] This view rather emphasizes that marriage is a social good, a vocational path, etc., because it responds to and respects the human and supernatural conditions of each person. If marriage is an important part of the common civil and ecclesial good, it is precisely because of a person's importance in the richest and most peculiar of the primary social manifestations. Also, marriage never exists in the abstract, only in specific spouses. Thus the legislator's general disposition to value and protect marriage must be understood as a particular placement of value on its being specifically exercised by the faithful.

Perhaps that is why it is not right to base this principle solely on the defense of indissolubility. Although explicit reference is made to the possibility of entering into a new marriage, that is only a consequential defense and it appears at a second moment. The principle itself is perhaps more related to institutional respect and protection of the parties' intention. In the end, this is not a question of being able to or not being able to remarry in spite of a prior bond, which would directly affect indissolubility, but of considering whether or not the marriage itself exists that consequently would be an obstacle to establishing a later bond. If a marriage does not exist, there is no need to defend indissolubility because there is no subject, no substance.

Lastly, *favor iuris* must be translated into a simple presumption (*iuris tantum*), for in deciding a case, justice can only be *pro rei veritate.* It is possible for conflicts to exist between the internal and external forums, but the legislator deems that the importance of the matter, juridical security, the impossibility of evaluating the subjective pressure of opinions,

6. Cf. J.M. MANS PUIGARNAU, *Derecho Matrimonial Canónico,* vol. 1 (Barcelona 1959), pp. 21–23.

and the operation of formal and substantive procedural requirements demand protection for what appears to be real, according to the facts. And if action is taken against the will of the affected subjects, the response can be that action is taken in accordance with the intention presumably manifested by the subjects and after analyzing all pertinent allegations in the process. However, this presumption is conditioned by the peculiar nature of cases referring to the status of persons, for they never become an adjudged matter (cf. c. 1643); they therefore remain open to the possibility of a new consideration at the seat of justice.

c) *Elements of the supposition of fact*

With respect to the supposition of fact required before the presumption can act, the following are required: *a)* The relationship must have had a formal beginning, understood as such by the parties. *b)* There must be a question of establishing a juridical relationship. *c)* The juridical *formality* must present a true *appearance* of marriage. If nothing truly marital has existed, there is no fact upon which to base a presumption. In the case of simple cohabitation, for example, or a so-called legal union between homosexuals, the presumption has no object. A different matter is the difficulty in some cases of proving that a marriage was celebrated, or derivatively, the condition of spouses. Such a difficulty does not directly affect the presumption, but does affect proof of the supposition of fact protected thereby.

With respect to applying the procedural principle, the following are obviously necessary: *a)* At the end of the case, the judge must still have some doubt about the validity of the marriage entered into, for if the marriage is valid, no presumption is necessary. *b)* The judge may not have reached moral certainty about the nullity of the impugned marriage, for if nullity is certain, presumption ceases to operate as such. *c)* The doubt may be of fact or of law. *d)* Lastly, when there are various marriages of a single party, presumption should be applied successively to each of the marriages apparently entered into, starting with the first. In a Response dated June 26, 1947[7] on the validity of a marriage, the CPI stated that where there is positive and unresolvable doubt, the judgment should come down on the nullity of a later marriage "dummodo causa definiatur ad ordinarium tramiten iuris."

5. *"Favor iuris" of marriage and "privilegium fidei"*

As we indicated at the beginning of this commentary, this canon omits explicit mention that *privilegium fidei* prevails over *favor matrimonii*. This supposition of fact will hold when there is doubt about a

7. *AAS* 39 (1947), p. 374.

marriage entered into by two non-baptized persons, one of whom has later received baptism with the other requisites established by law (cc. 1142–1150). Doctrine finds that, in spite of the fact that the legislator did not directly mention a possible conflict between the two canons, *favor fidei* would continue to prevail over favor of marriage.

In this case there must be various interrelated elements. First, just as the validity of a marriage between baptized persons may be presumed, especially persons who have entered into marriage under canon law due to the care and guarantees required by the system in preparing for marriage, the presumption loses force when a marriage is entered into under the jurisdiction of a different system. Second, a non-sacramental marriage can be dissolved with just cause by Church authority, and a lesser power is subsumed under a greater. Furthermore, the connection with the marital situation of a faithful Catholic comes into play.. Finally, the role of faith is relevant, the role of the Christian life of a member of the faithful as a spouse and as the foundation for a family. The exercising of *ius connubii* by a member of the faithful is designed to achieve an improvement, a benefit, with respect to the member's faith with regard to his conjugal and family situation. It is this new situation of the Catholic faithful that introduces the specific content of the right to enter into marriage as a fundamental right of the faithful, at the supernatural level of one's Christian being and ecclesial mission. Therefore, also, the presumption must be in favor of faith, a position that is presupposed in the juridical figure under consideration. That which enjoys favor of law is not the nullity of marriage, but the privilege of faith when there is doubt about the validity of a prior bond.

After all, this is not the dissolution of a marriage entered into before baptism, but a legal presumption, in case of doubt, with respect to the nullity of a marriage, and that makes dissolution of the doubtful bond unnecessary. Obviously, there could be proof to the contrary, which would be no obstacle to dissolution if there were a just and proportionate reason.

1061 **§ 1. Matrimonium inter baptizatos validum dicitur ratum tantum, si non est consummatum; ratum et consummatum, si coniuges inter se humano modo posuerunt coniugalem actum per se aptum ad prolis generationem, ad quem natura sua ordinatur matrimonium, et quo coniuges fiunt una caro.**

§ 2. Celebrato matrimonio, si coniuges cohabitaverint, praesumitur consummatio, donec contrarium probetur.

§ 3. Matrimonium invalidum dicitur putativum, si bona fide ab una saltem parte celebratum fuerit, donec utraque pars de einsdem nullitate certa evadat.

§ 1. A valid marriage between baptised persons is said to be merely ratified, if it is not consummated; ratified and consummated, if the spouses have in a human manner engaged together in a conjugal act in itself apt for the generation of offspring: to this act marriage is by its nature ordered and by it the spouses become one flesh.

§ 2. If the spouses have lived together after the celebration of their marriage, consummation is presumed until the contrary is proven.

§ 3. An invalid marriage is said to be putative if it has been celebrated in good faith by at least one party. It ceases to be such when both parties become certain of its nullity.

SOURCES: § 1: c. 1015 § 1; *GS* 49
§ 2: c. 1015 § 2
§ 3: c. 1015 § 4; CodCom Resp. II, 26 iun. 1947 (*AAS* 39 [1947] 374)

CROSS REFERENCES: —

COMMENTARY

Juan Ignacio Bañares

1. *Meaning of the canon*

This canon explains the meaning of terms traditionally used in canon law to designate certain types of marriage. The elements that primarily come into play and give rise to these terms are the following: in a valid and sacramental marriage, whether it is or is not consummated; in a null

marriage, the good faith of at least one of the parties. Secondarily, however, if the spouses have cohabited after entering into marriage, the concept and requirements of consummation are presumed. There are, then, two different questions that are apparently incidental, but actually have clear and undisputed juridical relevance, the fact that they are considered obliquely does not obscure the recognition of the relevance.

2. *Canon 1015 of CIC*/1917

In theory, the text of the current c. 1061 includes the meaning of c. 1015 of *CIC*/1917[1] almost literally. However, we note one suppression, two insignificant changes and a clarifying innovation that we shall cover later. The item eliminated is the old § 3, which described a valid marriage between non-baptized persons as "legitimate."[2] The reasons were rather practical and technical than anthropological or derived from a requirement for greater or better justice. The specific reasons that led the consultors of the relevant *coetus* to propose eliminating it were the following: *a)* It is not necessary to define every type of marriage. *b)* The term is self-explanatory. *c)* No peculiar juridical effect is attributed to the term that is not also true of a valid marriage. *d)* No technical definition is needed because the term does not appear elsewhere in the Code.[3]

Furthermore, *legitimate* is a term that had already been coined and is also used in other areas of law, not only in marriage law nor exclusively with this meaning. Therefore, elimination of the term helps us to avoid possible confusion. It is not easy to understand why such a broad adjective as "legitimate" should be used only for the marriage of non-baptized persons. Even in *CIC*/1917 the term "legitimate" was sometimes used as a synonym for "valid" (cf. cc. 232 § 2,2°, 331 § 1,1°, 504 and 1075,1° *CIC*/1917). However, if a marriage is between non-baptized persons, that fact is usually indicated. In fact, by saying "valid marriage," or even only "marriage," "valid" is substituted for "legitimate," which is then unnecessary. In the end, there is no problem if doctrine continues to use the old term "legitimate" when systematically developing the subject matter, it will no doubt still be understood, although it seems that the term is already beginning to disappear.

The insignificant changes refer to how the first paragraph of the canon is expressed. The old text said, "matrimonium baptizatorum

1. Cf. A. BLAT, *Commentarium Textus Codicis Iuris Canonici, Liber* III, Pars I (Rome 1920), pp. 502–503; F.X. WERNZ-P. VIDAL, *Ius Canonicum,* V (Rome 1946), pp. 19–24; P. GASPARRI, *Tractatus Canonicus de Matrimonio*, I (Typis polyglottis Vaticanis 1932), pp. 38–39.

2. Cf. TH.M. VLAMING (L. BENDER), *Praelectiones Iuris Matrimonii,* 4th ed. (Bussum 1950), p. 42.

3. Cf. *Comm.* 9 (1977), p. 128.

validum dicitur *ratum*, si nondum consummatione completum est"; the text of the new canon says, "matrimonium inter baptizatos validum dicitur ratum tantum, si non est consummatum." Therefore, with respect to determining the type of marriage to which this supposition refers, precision has been gained. It seems that *CIC*/1917 intended to refer to the marriage of baptized persons "with each other," and not to the marriage of a baptized person with a non-baptized person. That can be deduced from the common interpretation of doctrine and from the fact that the legislator of *CIC*/1917 was interested in reserving the term "ratified" for sacramental marriages, since previously any unconsummated marriage, sacramental or not, was described as ratified.

The next change is the substitution of "non est consummatum" for "consummatione completum est." Here too there are no substantive reasons for the change, but rather juridical and technical reasons so as not to give the impression that if a marriage "completum est consummatione," it is "*incompletum* sine consummatione," which would give excessive weight to consummation with reference to constitution of the bond as the essence of marriage *in facto esse*. It is certainly true and well known that consummation is relevant and significant to the sacramental dignity of marriage,and it particularly strengthens the bond. That means, *sensu contrario*, that a marriage may be dissolved if the sacramental marriage has not yet achieved its full significance through consummation. Thus we can in truth say that consummation is related to the possibility of dissolving the sacramental bond. However, relating it to the *constitutive* moment of the marital bond should be avoided.[4]

3. *The principal innovation in this canon*

Apart from the changes that are basically intended to clarify terminology or make it more precise, this canon brings an important innovation because it resolves an old problem in interpreting the scope of the norm. Specifically, the old Code text described consummation "si inter coniuges locum habuerit coniugalis actus, ad quem natura sua ordinatur contractus matrimonialis et quo coniuges fiunt una caro." The present text clarifies that there is consummation "si coniuges inter se humano modo posuerunt coniugalem actum per se aptum ad prolis generationem, ad quem natura sua ordinatur matrimonium, et quo coniuges fiunt una caro." This means that: *a)* It was preferred to avoid the term *contractus* to refer to the marriage covenant and to substitute *matrimonium* for it, which is consistent with the legislator's intention in the latest reform of the Code (see introduction to tit. VII and commentary on c. 1055). *b)* The conjugal act should be sufficient per se to engender; the explanation might be considered

4. Cf. ibid., p. 129.

superfluous, but it does illuminate the juridical concept of impotence in c. 1084 § 1. *c)* The act must be performed in a human manner, with the use of reason and free will.

The requisite of "in a human manner" ("humano modo") resolves some cases where offspring were engendered, but through an anomalous consummatory act. Perhaps the precept is stated positively because the intention is to delimit the suppositions of fact. What we have is a minimum of rationality, free will and normality that allows the human act to be described for content and performance. It is human because one is aware of what one is doing and has been advised about the act. It is human because it does not harm the personal freedom of the other spouse. And it is human because it respects the natural order of the act itself, and does not objectively contradict it. Thus any irrational, violent, gravely disproportionate or unnatural act is excluded. And any act in which those traits are absent, even if it is not perfect or fully performed, is acceptable, that means any act done freely, even if free will is somewhat diminished, as long as it is not absent. Considering the content of *ius connubii* and its projection *in facto*, restrictive norms must be strictly applied.

Such a concept of consummation effectively stills accusations of being too physical, too objective or too institutional, and introduces the necessary reference to the behavior of the parties. At the same time, it is clear that a so-called "spiritual" or "existential" consummation, which could only be achieved with the fullness of human and Christian maturity of the spouses, cannot be required. Such a requirement would definitely prejudice weaker members of the faithful, people moralists used to call rude, and would unjustly raise the level of objective perfection of the sacramental significance. It would at the same time lower the theological content of the conjugal act, depriving it of effect by in fact postponing the perfective moment of the sacramentality of the bond until some indefinite and indefinable time. In addition to the harm to *ius connubii* as a fundamental right of the faithful, that is, *in sinu Ecclesiae*, as a sacrament, there would also be a contradiction with traditional theological and canonical doctrine. The consequence would be to convert every marriage into a form of "legalized open cohabitation." The importance of limiting the concept of consummation is closely related to the peculiar strength of the bond and the consequent impossibility of dissolution (cf. c. 1141).

4. *The presumption of consummation*

The second paragraph of the canon states that consummation must be presumed if the spouses have cohabited after entering into marriage. Such a presumption presupposes the following: *a)* A valid marriage was established. That would not be the case, for example, if the spouses had not cohabited after a marriage previously, and invalidly entered into

between them, had not been convalidated. It would also not be the case if two persons obligated to observe canonical form should first try to have a *civil marriage* and later a canonical marriage, but never cohabited after the canonical marriage, the reason being that the first union was not a marriage and therefore there could be no consummation. *b)* The marriage must be sacramental. There could be, therefore, no juridical concept of consummation if the parties validly entered into a non-sacramental marriage and after each was baptized, they did not cohabit. *c)* It should not be deduced *contrario sensu* that proof of non-cohabitation implies proof that the marriage was not consummated; in other words, this is a legal presumption in favor of consummation if there is cohabitation, not in favor of non-consummation if there is no cohabitation. That is because of the difficulty that could arise in some cases to prove there was no cohabitation. It would be another matter if the fact of the physical impossibility of being together after marriage were proved. *d)* As explicitly stated in the text of the canon, here we have a presumption *iuris tantum*, which admits proof to the contrary, as occurs so often in impotence cases.

5. *Invalid marriage entered into in good faith*

The third paragraph of the canon determines the meaning of a specific term depending on the subjective situation of persons who have invalidly entered into marriage. For a marriage to be described as "putative," there must first have been a celebration of the marriage. Here there is a question as to the form of the required celebration. Would any form of celebration be sufficient? Would the subjective criteria of the parties be sufficient? Would marriages entered into with a defect of form be excluded?

In a Response on January 26, 1949,[5] the CPI stated that, to apply this supposition, the celebration must have taken place *coram Ecclesia*. That presupposes following the form established by canon law (and this Response is cited as the sole source outside the code of this paragraph of c. 1061). The statement may be somewhat surprising since the third paragraph of this canon does not refer to marriage between baptized persons; it makes no express mention of them, in contrast to the first paragraph. Although it is consistent with the tenor of the canon, which refers to the presumption of a valid marriage (§ 1), and invalid marriage (§ 2), it is still true that in the third paragraph there is no express limitation of the scope of the term "putative" to marriage between baptized persons. On the other hand, when the Response requires canonical form, it does not completely exclude non-baptized persons for they would be included under the case of persons who married a Catholic in the Church. On the other hand, baptized non-Catholics would be excluded unless they entered into marriage

5. *AAS* 41 (1949), p. 158.

in the Catholic Church. There would still remain the difficulty of clarifying the position of a Catholic who entered into marriage with a non-Catholic of the Eastern rite following the form of that religious confession, which the Church admits as valid.

In any case, the Response makes the following assumptions: *a)* The first criterion for applying the presumption should be that of form, specifically determined by the canonical form of the celebration of the marriage entered into. *b)* For this purpose the subjective condition of the parties as Catholics, non-Catholics, baptized or not, would not be relevant. *c)* Not covered by this presumption are those who are obligated to use the canonical form and in good or bad faith enter into marriage outside canonical form; in such a case it would be not so much a null marriage as a non-existent marriage (the first opinion of the consultors in the respective *coetus* changed[6] on this point). *d)* Persons entering into marriage with complete absence of form, whether ordinary or extraordinary, are also not included in this presumption, for there must be some kind of celebration that could provide the occasion for considering good faith, at least by one of the parties, in celebrating a marriage before the Church. *e)* However, doctrine agrees that even with a defect of substance, a marriage entered into canonically may be called putative, for that would not impede the second requirement of good faith by the parties; theoretically, it might even justify it.

In conclusion, it is clear that the first element (invalidity of a marriage) must be understood to be linked to the objectivity of the formal type of celebration. On the other hand, the second element of this figure explicitly refers to the subjective will of the parties when it requires that marriage be celebrated "in good faith by at least one party." It seems that in this case, "in good faith" is simply meant to indicate that both parties, or at least one party, when celebrating marriage before the Church, must hold the conviction that they are truly becoming the spouse of the other party. The term is relevant precisely for a person who acted in good faith and who lives in good faith as a spouse. And also for that reason the term "putative marriage" ceases to be applicable at the moment both spouses become certain of nullity. From a juridical point of view, certainty obtains with the declaration of nullity according to law.

The practical dimension of a putative marriage is basically related to the *legitimate* filiation of any offspring conceived (see cc. 1137–1140 and the commentaries thereon). Although in the Code discrimination against illegitimate children has been avoided, the legislator has wished to maintain the concept of "legitimate" expressly to safeguard the sanctity of marriage and to permit, if suitable, any norms that might be established in particular law.[7]

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6. Cf. ibid., p. 130–131.
7. Cf. *Relatio* (1981), p. 264; *Comm.* 10 (1978), p. 106.

1062 **§ 1. Matrimonii promissio sive unilateralis sive bilateralis, quam sponsalia vocant, regitur iure particulari, quod ab Episcoporum conferentia, habita ratione consuetudinum et legum civilium, si quae sint, statutum fuit.**

§ 2. Ex matrimonii promissione non datur actio ad petendam matrimonii celebrationem; datur tamen ad reparationem damnorum, si qua debeatur.

§ 1. A promise of marriage, whether unilateral or bilateral, called an engagement, is governed by the particular Law which the Bishops' Conference has enacted after consideration of such customs and civil laws as may exist.

§ 2. No right of action to request the celebration of marriage arises from a promise of marriage, but there does arise an action for such reparation of harm as may be due.

SOURCES: § 1: c. 1017 § 1
§ 2: c. 1017 § 3; CodCom Resp. IV, 1–2, 2–3 iun. 1947 (*AAS* 39 [1947] 345)

CROSS REFERENCES: —

COMMENTARY

Juan Ignacio Bañares

1. *Promise of marriage*

The institution of the formal engagement to marry has enjoyed a long canonical tradition.[1] Although in many places at present it is used less than in earlier periods, it is reasonable to retain a juridical regulation that defines its limitations. First, it has been used for centuries. Second, since it depends upon collective custom and personal preferences, some of the faithful may wish to have a formal engagement.[2] Third, it is definitely consensual in both origin and content and linked to a will to marry. It is a unilateral or bilateral commitment (a promise) supported by a will to enter into marriage in the future with a certain and determinate person. Thence

1. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, V (Rome 1946), pp. 99–139 (especially 102–106).
2. Cf. *Comm* 9 (1977), p. 131.

we may deduce the following: *a)* It is the fruit of an act of free will. *b)* Its direct object is to express a will to enter into marriage. *c)* Consequently, it may be understood to be a right derived from *ius connubii* in the process of forming the will to enter into marriage. *d)* The intent of the promise is to produce certain juridical effects related to a possible future marriage. For all of the above reasons, the legislator has retained the juridical treatment of this formula, while accommodating it to the needs of and/or suitability for the present time.

The fundamental elements of the institution may be said to be the concept, the form of celebration, the scope of its effects, its relationship with the future marriage to which it is directed, and the connection with the pertinent civil law system. Those topics will be taken up next.

2. *The regulatory source*

With respect to this concept, naturally, nothing substantial has varied from the prior legislation. There is a promise of marriage; if it is bilateral, the promise may be called espousal, plight, troth, betrothal or engagement.

Canon 1017 of *CIC*/1917 specifically established the form of celebration, which is unique to the Latin Church. This canon, on the other hand, remits directly to the particular law that each Bishops' Conference should establish, taking into account any customs and civil laws. Therefore: *a)* It appears that the Bishops' Conferences are *required* to establish this particular law, for theirs is not the potential power to create a juridical concept, but the regulation of an institution established by universal law. *b)* Bishops' Conferences must consider the sociological and civil juridical conditions of their respective territories, but no specific criteria are imposed upon the Conferences to include the civil or sociological conditions in their norms or to be different from them. *c)* Therefore, there may be a normative system for the promise to marry that remits absolutely to civil law. The system could also partially remit to civil law. It could canonize customary practices. It could be partially or completely innovative with respect to the State system. It could even provide for differing forms that depended upon various laws or customs, different geographical areas, groups of faithful, or particular civil restrictions. We may cite as examples African countries where diverse traditions co-exist, or a federal state that includes different types of legislation on the matter.

Canon 1017 of *CIC*/1917 referred only to the *form of celebrating* the promise, the requirements of the *constitutive moment.* The present canon, however, speaks generically and says that a promise of marriage "is governed by particular law ..." Does that mean that particular law may regulate something more than the form of celebration? Since the legislator does not restrict the scope of the regulations, that is a real possibility, for

example, causes and types of cessation, rescission or revocation of the act, etc. In other words, particular law may regulate everything concerning the origin, formalities and extinction of the juridical concept. The only limits would be those established by natural law, and, therein, by limiting the effects of the promise. That is expressly stated in the second paragraph of this canon and it is the topic we shall consider next.

3. *Scope of the juridical definition of the promise*

Just as in the previous Code, the *effects* of the juridical concept are fixed by universal law with respect to two points, which are, first, the relationship between the promise and the effective will to marry that is part of the act of consent, and second, regulations on any damages incurred due to failure to keep the promise.

With respect to the first point, the canon clearly indicates that "no right of action to request the celebration of marriage arises from a promise of marriage." The parallel canon of *CIC*/1917 specified, "although the promise is valid and there is no just reason to exempt the maker from keeping it." The current text has eliminated those two clauses, the one referring to validity, perhaps because it is self-evident and a requirement of any juridical act. The other clause, referring to whether or not there is just cause for failure to keep the promise, was probably eliminated because it is understood that sufficient just cause for not marrying is no longer wishing to enter into the marriage. Since this is a question of *present* will to enter freely into marriage, it is difficult to discern what an *unjust* cause might be, for the sole effective cause of marriage is the free act of the party. It is hard to see any reason whatsoever to determine that a change of will is unjust; no one can have any right over that free act, not even by reason of a prior commitment.

Thus the norm recalls a distinction that is rooted in natural law, the distinction between a promise for the future, and the present will that is required at the time of consent. It also recalls the distinction between a possible moral judgment of a specific act—the damages produced as a consequence of change of promise—and a strictly juridical consideration of its relevance to the intention to marry. One sector of doctrine opines that a *moral* obligation to enter into the future marriage arises from the promise.[3] Other authors think that there can never be a strict obligation to marry because of the fundamentally consensual character of marriage *in fieri*. From that viewpoint, one could speak of an "alternative obligation:" either to fulfill the promise of celebrating the marriage agreed upon, or to compensate adequately for any damages derived from failure to fulfill the

3. Cf. TH.M. VLAMING (L. BENDER), *Praelectiones Iuris Matrimonii*, 4th ed. (Bussum 1950), pp. 78–81.

promise.[4] Basically, however, even the term "alternative obligation" seems excessive. It could be understood as linked in some way to the will to marry, but it actually is a present manifestation of a foreseeable future will by which the duty to answer concretely for any prejudice caused to the other party is taken on as a consequence of acts derived from the expectation.[5]

Different from the juridical obligation to enter into marriage, however, is the question of the *harmful effects* that may be derived from failure by one of the parties to fulfill the promise. Celebrating a betrothal gives rise to an action "for such reparation of harm as may be due," as previously established in *CIC*/1917. The elements of this supposition are the following: *a)* The betrothal must have been celebrated (that is a given). The validity of the promise requires that the parties be capable, that there be no defect of will, and that the promise refer to a licit and juridically possible marriage.[6] *b)* There is a unilateral revocation of the will to marry with the consequent failure to fulfill the promise made. If the revocation is consensual, there is a rescission, with agreement between the parties over the effects of the rescission, and there is no harm "caused by failure to fulfill." *c)* The failure to fulfill the promise must have directly caused prejudice for the other party. In other words, an attempt is being made to make reparation for damages caused from specific acts *intuitu matrimonii* and directed in some way toward the future marriage. In fact, at present a promise to marry, especially when consisting of a betrothal in the strictest sense, mainly consists of a precaution, usually quantifiable, against a possible revocation of the will to marry by the other party. This tendency to patrimonialize betrothal is strong evidence of the distinction with respect to consensual will per se, and it emphasizes the opinion that there is no obligation.

The forum for the action will also ordinarily depend upon particular law. If legislation by the Bishops' Conference has canonized civil law on this point, civil law should be followed. If there is no civil law or legitimate custom on the matter, and a specific norm has been established, that norm will have to be followed. It may also be that particular law permits the use of either forum or requires permission of the local ordinary to go to civil courts. In any case, just as the first paragraph indicates that Bishops' Conferences must take local laws and customs into account when defining their norms, they must also take the local laws and customs into account to establish the proper channel for the action. Since these cases usually involve patrimonial or pecuniary matters (or, at least, quantifiable matters)

4. Cf. A. DE SMET, *Tractatus Theologico-canonicus de Sponsalibus et Matrimonio*, 4th ed. (Bruges 1927), pp. 4–29 (especially 17–22).

5. Cf. G. DSSETTI, *La formazione progressiva del negozio matrimoniale canonico. Contributo alla dottrina degli sponsali e del matrimonio condizionato* (Bologna 1954).

6. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho Matrimonial Canónico*, 5th ed. (Madrid 1986), p. 198.

they must especially take into account the fact that the State has more means available to force reparation of the harm caused.

In art. 2 of the General Decree of November 21, 1986, the Spanish Conference of Bishops availed themselves of the authority granted them by this canon and established that "Spanish civil legislation in the Civil Code and in statutory legislation that regulates betrothals has the force of canon law, including the proviso of c. 1290." That canon refers to the juridical regulation of contracts; it canonizes civil law on the matter unless contrary to divine law or to the express prescriptions of canon law.

CAPUT I
De cura pastorali et de iis quae matrimonii celebrationi praemitti debent

CHAPTER I
Pastoral Care and the Prerequisites for the Celebration of Marriage

INTRODUCTION

Tomás Rincón-Pérez

1. The legislation in the 1917 Code included a number of juridical requirements that tended to guarantee a valid and lawful celebration of marriage. It also included some other requirements and recommendations that were pastoral in nature and invited the parties to become aware of the responsibility they were taking on and the sanctity of the sacrament they were celebrating. In addition to being concerned that the marriage be lawful and valid, the legislator of *CIC*/1917 was interested in other matters pertaining to preparation for marriage. It was a duty of the parish priest "ne omittat parochus," stated the old c. 1033) to instruct the spouses adequately on the sanctity of the sacrament of marriage, their mutual obligations and the obligations of parents toward their children. Instruction was to be suited to the various conditions of the persons involved ("secundum diversam personarum conditionem"), reflecting not only good pedagogy, but tactful respect for *ius connubii*, which should in no case be compromised by a preparation that is always proper, but not absolutely necessary, unless ignorance might affect the fundamental nuclei of the marriage covenant. The parish priest was also obligated to exhort spouses strongly to confess their sins before celebrating marriage and to receive the Holy Eucharist piously.

Previously, in c. 1018, the legislator had imposed upon the parish priest the duty to instruct people prudently about the sacrament of marriage and the impediments thereto, and to discover whether the parties were sufficiently instructed in Christian doctrine (c. 1020 § 2). It is common knowledge that shortly after *CIC*/1917 was promulgated, the Pontifical Commission for interpreting the Code specified the scope of this due instruction requirement. The Commission came out with the exhortation to do everything possible to instruct believers in at least the elementary truths of Christian doctrine, but if the parties were not likely subjects,

"quodsi renuant, non est locus eos respuendi a matrimonio ad normam c. 1066."[1]

It is certainly true that social circumstances today are very different from those in the early years of the century. Even the family has lost ground as the principal educator in the values of marriage. Finally, the level of the dechristianization of society is much higher. That is no obstacle, however, to the still effective force of the Pontifical Commission's response, since it is sensitively respectful of the every person's right to enter into marriage.

It should not be deduced from what has been said so far that the old legislation was a model with regard to preparation for marriage. In addition to the difference in social circumstances today, among which is the atmosphere of dechristianization, and perhaps because of that, the need for revising the legislation on the matter was felt in the preparatory phase of Vatican Council II. There were several proposals from bishops that were directed toward obtaining a more intense preparation for the sacrament of marriage. Those proposals did not, in fact, become a part of the conciliar documents, but they were kept in mind during the task of codification.

After the Council, the Ritual for the Sacrament of Marriage was a key document. In the Spanish version, the Spanish bishops added a "doctrinal and pastoral orientation" with special importance given to the section on "preparation for marriage."

As in other parts of the Catholic world, that was the beginning of a particular legislative process that was difficult to configure juridically. Since the legislation in *CIC*/1917 was considered insufficient, the new version was justified by a commendable desire to contribute to the worthy and fruitful celebration of the sacrament of marriage at a time when the dechristianization of society was becoming more and more widespread in the matter of marriage.[2]

The generally positive value of the new marriage legislation does not prevent us from also pointing out how much ambiguity it sometimes shows. Examples of this would be, when obligatory attendance at premarital courses or other forms of preparation is raised *de facto* to a canonical impediment; when an attempt is made to exclude baptized persons who are nonbelievers or non-practitioners from celebrating the sacrament

1. *AAS* 10 (1918), p. 345.

2. Cf. F.R. AZNAR GIL, *La preparación pastoral para la celebración del sacramento del matrimonio en la legislación particular española posconciliar (1977–1986)* (Zaragoza 1981). For the teachings and norms of the French, Spanish, Belgian, Italian and Swiss episcopates, cf. F. ALARCÓN, *El matrimonio celebrado sin fe* (Almería 1988), pp. 109–119; T. RINCÓN-PÉREZ, "Preparación para el matrimonio y 'ius connubii'," in *El matrimonio. Cuestiones de Derecho administrativo canónico (IX Jornadas de la Asociación Española de Canonistas)* (Salamanca 1990), pp. 37–79.

under the assumption that the lack of personal faith is an insuperable obstacle for the validity of the sacrament; or when marriage in stages is recommended, received religiously but not sacramentally.[3] Many of these norms and the pastoral practices they invited were issued before the 1983 Code became effective. Thus it is important to know the scope of the universal legislation, by which particular norms are to be assessed.

It is undeniable that current legislation, in contrast to *CIC*/1917, shows special attention to and interest in regulating this matter when it groups together in a single chapter all the norms that formerly were dispersed, when it gives emphasis to the pastoral aspects and not just to the juridical aspects of preparation, and also when it requires a fruitful celebration of the sacrament. These norms are due to the conviction that Christian marriage is a path to sanctity, a special vocation within the Church, to achieve which Christian spouses "peculiari sacramento roborantur et veluti consecrantur" (*GS* 48).

2. The title of the chapter is a good indication of the two great areas of subject matter included therein. First, there is the area that refers to pastoral care proper, and second, the area that refers to juridical prerequisites, aimed at a valid and lawful celebration of marriage. Also included as a precautionary norm is the requirement of obtaining permission from the local ordinary to assist at certain marriages (c. 1071).

The three great subject areas covered by this chapter on preparation for marriage are the following:

1) Norms on prematrimonial pastoral care

2) Juridical prerequisites to ensure the validity and lawfulness of the marriage celebration

3) The requirement of permission from the local ordinary for lawful assistance at a number of types of marriage as a precautionary measure to safeguard various values defined in c. 1071

In summary, we could say that the chapter includes three types of measures: pastoral, juridical and precautionary. Naturally, these different types have a single didactic purpose, for the juridical aspect is not excluded from the so-called pastoral measures, and the measures we have called juridical are still pastoral, or they are juridical prerequisites imbued with a pastoral nature.

3. Cf. regarding these new pastoral options F. ALARCÓN, *El matrimonio…*, cit., pp. 37–49; cf. T. RINCÓN-PÉREZ, "El requisito de la fe personal para la conclusión del pacto conyugal entre bautizados, según la Exh. Ap. 'Familiaris Consortio'," in *Ius Canonicum* 23 (1983), pp. 206–207.

1063 **Pastores animarum obligatione tenentur curandi ut propria ecclesiastica communitas christifidelibus assistentiam praebeat, qua status matrimonialis in spiritu christiano servetur et in perfectione progrediatur. Haec assistentia imprimis praebenda est:**

1° praedicatione, catechesi minoribus, iuvenibus et adultis aptata, immo usu instrumentorum communicationis socialis, quibus christifideles de significatione matrimonii christiani deque munere coniugum ac parentum christianorum instituantur;

2° praeparatione personali ad matrimonium ineundum, qua sponsi ad novi sui status sanctitatem et officia disponantur;

3° fructuosa liturgica matrimonii celebratione, qua eluceat coniuges mysterium unitatis et fecundi amoris inter Christum et Ecclesiam significare atque participare;

4° auxilio coniugatis praestito, ut ipsi foedus coniugale fideliter servantes atque tuentes, ad sanctiorem in dies plenioremque in familia vitam ducendam perveniant.

Pastors of souls are obliged to ensure that their own church community provides for Christ's faithful the assistance by which the married state is preserved in its christian character and develops in perfection. This assistance is to be given principally:

1° by preaching, by catechetical instruction adapted to children, young people and adults, indeed by the use of the means of social communication, so that Christ's faithful are instructed in the meaning of christian marriage and in the role of christian spouses and parents;

2° by personal preparation for entering marriage, so that the spouses are disposed to the holiness and the obligations of their new state;

3° by the fruitful celebration of the marriage liturgy, so that it clearly emerges that the spouses manifest, and participate in, the mystery of the unity and fruitful love between Christ and the Church;

4° by the help given to those who have entered marriage, so that by faithfully observing and protecting their conjugal covenant, they may day by day achieve a holier and a fuller family life.

SOURCES: 1°: cc. 1018, 1033; *GS* 47, 52
2°: cc. 1018, 1033; *CC* 3; *GS* 52; OCM *Prae* 5
3°: cc. 1018, 1033; *SC* 19, 59, 77; OCM *Prae* 6
4°: cc. 1018, 1033; *LG* 41; *GS* 52

1064 **Ordinarii loci est curare ut debite ordinetur eadem assistentia, auditis etiam, si opportunum videatur, viris et mulieribus experientia et peritia probatis.**

It is the responsibility of the local Ordinary to ensure that this assistance is duly organised. If it is considered opportune, he should consult with men and women of proven experience and expertise.

SOURCES: —

CROSS REFERENCES: —

COMMENTARY

Tomás Rincón-Pérez

1. *Present necessity of preparation for marriage*

"More than ever necessary in our times is preparation of young people for marriage and family life. In some countries it is still the families themselves that, according to ancient customs, pass on the values concerning married and family life to young people, and they do this through a gradual process of education or initiation. But the changes that have taken place within almost all modern societies demand that not only the family but also society and the Church should be involved in the effort of properly preparing young people for their future responsibilities."

These authoritative words of *Familiaris consortio*, 66 are the best gloss of the two canons being discussed. The need for preparation, added the Pope, "is even more applicable to Christian marriage, which influences the holiness of large numbers of men and women. The Church must therefore promote better and more intensive programs of marriage preparation, in order to eliminate as far as possible the difficulties that many married couples find themselves in, and even more in order to favor positively the establishing and maturing of successful marriages."

In a speech before the participants of the Plenary Assembly of the Pontifical Council for the Family, on May 26, 1984, the Pope summarized this idea in the following way: "The future of humanity passes through the family. It is possible, however, to go farther, and say that the future of the family passes through adequate preparation."

2. *General objectives of prematrimonial catechesis*

Even from a juridical point of view, it is important to emphasize the objectives that should govern all preparations for a Christian marriage, both preparation in general and the preparation that immediately precedes the nuptials. It is important to point out that the horizon of preparation is not limited to simple instruction on the aspects of marriage related to the validity or lawfulness of the marriage covenant. That certainly must not be overlooked. Preparation must, however, be open to a broader perspective that contemplates marriage between baptized persons as a specifically Christian vocation. This would be a peculiar path to sanctity that all baptized persons who enter into a valid and lawful marriage, and who also open themselves to receive the specific grace of the sacrament, are capable of taking. Every valid marriage is a sign of God's love for humanity, and in the case of marriage between baptized persons, it is manifested in the love of Christ for the Church. This meaning, inherent to every conjugal union, like every purposeful mission in the Christian vocation, must become manifest, must become a living part of the spouses. That is possible only because the spouses, founders of a Christian family, through the sacrament "in their state and way of life have their own special gift among the People of God" (*FC* 49).

Number 68 of *Familiaris consortio* is devoted in great part to setting forth the reasons that "lead the Church also to admit to the celebration of marriage those who are imperfectly disposed." Many of the reasons are from the area of the validity of marriage, where the faith of the parties does not appear to be necessary. That is how the Pope responded to a theological and canonical question raised in the hall of the Synod of Bishops. According to the pontifical magisterium, the irrelevance of faith to validity is based on the peculiarity of this sacrament. It is a peculiarity that lies in the fact that "the sacrament is a reality that already exists in the economy of creation; it is the very marriage covenant instituted by the Creator at the beginning." The entire Exhortation is full of statements that tend to demonstrate the following three fundamental truths: *a)* Every marriage from the beginning, that is, original marriage, is so ordered as to symbolize the mysterious love of God for mankind. *b)* In the fullness of time, that is, in Christ, the reality of marriage from the beginning acquires *in actu* its fullness of meaning and all its saving force. *c)* The fullness of meaning and grace, which virtually affected the structure of original marriage, again permeates the marriage bond and its essential properties from the time when, through baptism, the spouses are truly introduced into the spousal covenant of Christ with the Church. They thus convert it into their own marriage covenant, even if they are not aware of it or do not wish it,

so long as they do not formally and explicitly exclude it, as a sign of the mystery of the incarnation of Christ and the mystery of the covenant.[1]

From that point of view, the sacramentality of marriage is not determined by the more or less explicit existence of baptismal commitments, the first of which is personal faith. It is determined rather by the objective fact that through baptism the parties are raised to a new level in which conjugality can only be sacramental.

Having said that, we must immediately add that in the mind of the Pope this is not the only nor the most important perspective in which the parties are to be formed. The problems of validity are one thing, quite different are the pastoral aspects of preparation for this peculiar form of Christian life in which the fruitfulness of the sacrament finds its full meaning. "Once again," concluded the Pope, "there is an urgent need for evangelization and prematrimonial and post-matrimonial catechesis, put in practice by the entire Christian community so that every man and every woman who marries may celebrate the sacrament of marriage not only *validly* but also *fruitfully.*"

After theological and canonical problems about the validity of marriage are clarified, the entire prematrimonial catechesis should point towards the fruit of the sacrament. For that it is essential that the preparation become a true itinerary of faith. "It is a special opportunity for the engaged to rediscover and deepen the faith received in Baptism and nourished by their Christian upbringing. In this way they come to recognize and freely accept their vocation to follow Christ and to serve the Kingdom of God in the married state" (*FC* 51). That is because "only in faith," as it was said a short time before, "can they discover and admire with joyful gratitude the dignity to which God has deigned to raise marriage and the family, making them a sign and meeting place of the loving covenant between God and man, between Jesus Christ and His bride, the Church" (ibid.).

From the perspective of faith, prematrimonial catechesis must definitely give an important position to a formation for Christian marriage in which the four main ideas appear that we summarize from *Familiaris consortio*, 56:

a) The sacrament of marriage, which presumes and specifies the sanctifying grace of baptism. It is the source and original means of sanctification for spouses and Christian families.

b) The gift of Jesus Christ, the mystery of his death and resurrection, through which conjugal love is purified and sanctified. His gift "does not end with celebration of the marriage, but accompanies the spouses

1. Cf. T. RINCÓN-PÉREZ, "El requisito de la fe personal para la conclusión del pacto conyugal entre bautizados según la Exh. Ap. 'Familiaris Consortio'," in *Ius Canonicum* 23 (1983), pp. 201–236.

throughout their lives." That was said by the Council (*LG* 48), when it indicated that Christian spouses "are fortified and, as it were, consecrated for the duties and dignity of their state by a special sacrament ..." In canonical terms, this means that the sacramentality of marriage does not end in *in fieri*, but is projected upon *in facto esse*; it is not only a sacrament *dum fit*, but *dum permanet*. In other words, sacramentality affects not only the marriage covenant, which is the *sacramentum tantum*, but the bond, or *res et sacramentum*, to use classic terms.

c) As a consequence of the above, the universal vocation to sanctity is also directed toward Christian spouses and parents. The vocation is specified by the sacrament celebrated and specifically translated by the realities of conjugal and family life. Thence are born, the Pope emphasized, "grace and the requirement of an authentic and profound *conjugal and family spirituality*, inspiration for which must be drawn from the motifs of Creation, Covenant, the Cross, the resurrection and the sign ..."

d) Finally, just as the gift and duty of the spouses to live in daily life the sanctification received is derived from the sacrament, so "from the sacrament also arise grace and the moral commitment to transform all of one's life into a continual spiritual sacrifice." That is the proper and specific way for Christian spouses to exercise the function of sanctification (c. 835 § 4) and "to consecrate the very world to God" (*LG* 34) through the earthly and temporal realities that characterize them.

Everything that has been said so far with respect to the principal objectives that should govern true prematrimonial preparation is relevant to the provisions that are simply stated in c. 1063, as they should be by a norm of the Code. The obligation imposed upon pastors of souls is designed so that the marital state "is preserved in its Christian character and develops in perfection." Similarly, the personal preparation of the engaged couple has for its objective that they "are disposed to the holiness and the obligations of their new state," and, in the present, enjoy a "fruitful celebration of the marriage liturgy, so that it clearly emerges that the spouses manifest, and participate in, the mystery of the unity and fruitful love between Christ and the Church."

3. *Phases and content of the preparation*

In anticipation of the provisions of the Code (*FC* is prior to promulgation of the Code), the Pope described preparation for marriage as a gradual and continuous process with three principal moments: *a)* remote, *b)* proximate, and *c)* immediate. Further on (no. 69), *Familiaris consortio* referred to a fourth moment: pastoral assistance to the already formed family, the equivalent of permanent formation of the spouses and parents.

a) Canon 1063 also describes the gradual and continuous process of pastoral assistance to marriage. Assistance must be given by the entire Christian community, but pastors of souls are obligated to ensure that it takes place. First there is a general formation, to be given to all Christians, on the meaning and requirement of marriage as natural and sacramental.

"Remote preparation," according to *Familiaris consortio* 66, "begins in early childhood, in that wise family training which leads children to discover themselves as being endowed with a rich and complex psychology and with a particular personality having its own strengths and weaknesses. It is the period when esteem for all authentic human values is instilled, both in interpersonal and in social relationships, with all that this signifies for the formation of character, for the control and right use of one's inclinations, for the manner of regarding and meeting people of the opposite sex, and so on. Also necessary, especially for Christians, is solid spiritual and catechetical formation that will show that marriage is a true vocation and mission, without excluding the possibility of the total gift of self to God in the vocation to the priestly or religious life."

b) The next moment is proximate preparation for entering into marriage. It is the personal preparation of the parties that will dispose them to the sanctity and obligations of their new state.

The legislator points out the ultimate objectives of prematrimonial catechism, but does not detail the content of the preparatory program nor the best instruments for carrying it out. Although *Familiaris consortio* also merely indicates the possible content, it gives more details of the possible content of prematrimonial catechesis. First, it is a more specific preparation for the sacraments, especially for the sacrament of marriage, so that it may be celebrated and lived with due moral and spiritual disposition. "The religious formation of young people should be integrated, at the right moment and in accordance with the various concrete requirements, with a preparation for life as a couple," added the Pope. "This preparation will present marriage as an interpersonal relationship of a man and a woman that has to be continually developed, and it will encourage those concerned to study the nature of conjugal sexuality and responsible parenthood, with the essential medical and biological knowledge connected with it. It will also acquaint those concerned with correct methods for the education of children, and will assist them in gaining the basic requisites for well-ordered family life, such as stable work, sufficient financial resources, sensible administration, notions of housekeeping" (ibid.).

c) In the immediate phase of preparation, the pontifical document adds that "among the elements to be instilled in this journey of faith, which is similar to the catechumenate, there must also be a deeper knowledge of the mystery of Christ and the Church, of the meaning of grace and of the responsibility of Christian marriage, as well as preparation for

taking an active and conscious part in the rites of the marriage liturgy" (ibid.). This last aspect, liturgical preparation, is also included in c. 1063, 3°. The future spouses are helped to understand the mysterious significance of Christian marriage and to participate as spouses in the mystery.

4. *Organization of pastoral prematrimonial preparation*

Familiaris consortio deemed it desirable for the Bishops' Conferences to assume the task of publishing a *directory for pastoral care of the family*. "In this they should lay down, in the first place, the minimum content, duration and method of the 'Preparation Courses,' balancing the different aspects—doctrinal, pedagogical, legal and medical—concerning marriage, and structuring them in such a way that those preparing for marriage will not only receive an intellectual training but will also feel a desire to enter actively into the ecclesial community" (no. 66).

In c. 1064 this task appears to fall to diocesan authority, for the norm states that the local ordinary is the one to ensure that assistance is duly organized. In any case, in the pastoral practice of the last few years, this subject that we are commenting on is what has most powerfully driven the creation and development of a diocesan particular law through prematrimonial preparation directories. With respect at least to directories prepared before the Code became effective, one author[2] pointed out that "the general tone, except for some isolated cases, is ambiguous in indicating the degree of obligation (for its norms), confusion between theological and juridical language, mixing diverse questions (doctrinal and normative), raising to the level of a thesis what is simply a working hypothesis or a theological option ..."

5. *Preparation for marriage and "ius connubii"*

The norms in the Code on formation for marriage are basic norms that require completion by particular norms. We have just been implicitly wondering if many of the diocesan norms in effect adequately safeguard *ius connubii*, or if they were established without taking it into consideration. The response requires an analytical study that would be out of place here.[3] In any case, the question is worth asking generically. We understand

2. F.R. AZNAR GIL, *La preparación pastoral para la celebración del sacramento del matrimonio en la legislación particular española posconciliar (1977–1986)* (Zaragoza 1981).

3. Cf. T. RINCÓN-PÉREZ, "Preparación para el matrimonio-sacramento y 'ius connubii'," in *El matrimonio. Cuestiones de derecho administrativo canónico* (IX Jornadas de la Asociación Española de Canonistas) (Salamanca 1990), pp. 37–79.

that today it is the task of theological and canonical science and of pastoral care to seek precise harmonization or an adequate balance between the right to enter into marriage that belongs to every baptized person (the only marriage possible for a baptized person—the sacrament), and the suitability of dignifying the celebration. In other words, a balance must be sought between the right to enter into a valid marriage and the duty to make it fruitful, whence arises the entire sacramental effect. For such a purpose, any pastoral effort would be small, but at the same time no Christian rights must be harmed. In pastoral practice, it is not infrequent to find arbitrariness and grave harm done to this right.

Furthermore, in the old discipline, the formal norm on *ius connubii* was found at the head of the regulations on impediments. The present c. 1058 is placed with the preliminary canons, implying that it not only serves as a point of reference for adequately regulating capacity and impediments, but for regulating everything that might mean restricting the right to enter into marriage, which is the case of prematrimonial preparation.

Arbitrariness, or harm to the fundamental right to the sacrament of marriage, may appear in two principal ways: *a)* the degree or substance of the obligatory nature of the preparatory norms for marriage, for example, prematrimonial courses; *b)* the strictness of requiring personal faith of the parties to enter into a marriage covenant.

We referred to this latter point above when discussing the ultimate objectives that should guide an intense formation for a Christian marriage. In summary, we may add that subjective faith is a factor in effectiveness, in fruitfulness, but not in validity. The greater the faith, the greater subjective disposition to receive the fullness of grace that is communicated through marriage, and the greater supernatural capability to respond faithfully to the vocation and mission implied by marriage. Hence it is a pastoral imperative to adopt all means that tend to achieve this last objective. In the midst of it all there is a fundamental right to marry that cannot be harmed, it transfers poorly to the area of validity, of the capability of the parties, that which belongs only to the area of the sacramental effect.

Because of its possible influence on *ius connubii*, it also seems a good idea to point out the nature and degree of obligation of the norms that regulate preparation for marriage as formative pastoral action. There can be no doubt that here we are looking at a moral obligation that affects those responsible for formation as well as the parties to the marriage. The importance of the marriage covenant from any point of view, natural or supernatural, carries with it this moral duty. Since it is morally obligatory to prepare oneself to perform an act of such personal and social importance, assistance could be pastorally required in the formation that must be programmed by those who are pastorally responsible. But can it be juridically required? How can pastoral requirements be made compatible with safeguarding *ius connubii*? In practice it is not easy to distinguish the two

dimensions, but an effort must be made to "keep a delicate balance between the *ius connubii* of all faithful (c. 1058) and the necessary preparation for them to receive fruitfully ... the sacrament of marriage ..." (c. 1065 § 2).[4]

That seems to be the best meaning to give the well-known text of *Familiaris consortio*, 66: "*Although the necessity and obligation of immediate preparation for marriage should not be underestimated*—which would happen if dispensations from it were easily given—nevertheless, such preparation should be set forth and put into practice in such a way that omitting it is not an impediment to the celebration of marriage." Fornés wrote that this implies that the means of pastoral action which are programmed (courses in prematrimonial formation, personal and collective catechetic instruction) and which the local ordinary should adequately organize and "if it is considered opportune, he should consult with men and women of proven experience and expertise" (c. 1064), cannot be required or imperative, *sensu stricto*, for the future spouses. The meaning of this is that the means of pastoral action cannot be impediments or quasi-impediments to marriage. The establishment of impediments, as we have seen, belongs only to the supreme authority of the Church (cf. c. 1075) and not to the local ordinary (cf. c. 1077). New impediments cannot even be introduced through custom (cf. c. 1076).[5]

In reference to prematrimonial courses, it has also been written that "their appropriateness and usefulness cannot be questioned; however, can the local ordinary impose such preparation on his faithful as an obligation, as a *sine qua non* requisite before the sacrament? The response to that question is clear: he cannot." After giving a positive foundation for this straight answer, the author added, "This point should be kept in mind by the Curias when they write their Directories. Expressions that may be unlawful must be avoided. Parish priests should also keep in mind that, carried away by an understandable but erroneous pastoral zeal, in no way can they deny marriage to anyone who cannot or does not wish to attend the courses. That would be doing grave harm to the inalienable *ius connubii* of the faithful."[6]

It should not be necessary to say that those comments are not an exaggerated defense of the right to marry without any limitations whatsoever; even less are they intended to belittle pastoral efforts in favor of the most intense prematrimonial preparation possible that "is most urgently recommended for engaged couples who still manifest shortcomings and

4. J. FORNÉS. "El Sacramento del matrimonio" (Derecho matrimonial), in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1988), p. 664.

5. J. FORNÉS, ibid.

6. M. LÓPEZ MARTÍNEZ, "Cursillos prematrimoniales, fe y sacramento del matrimonio," in *Revista Española de Derecho Canónico* 44 (1987), pp. 565–575. Cf. also O. FUMAGALLI, in *La normativa del nuovo Codice*, with reference to E. CAPELLINI (Brescia 1983), p. 215.

difficulties in Christian doctrine and practice" (*FC* 66). Any effort by the entire ecclesial community and by those responsible for pastoral care will always be small in light of the vocation to holiness that marriage implies and the unique mission that Christian families are called upon to fulfill in the Church and in human society.

1065 **§ 1. Catholici qui sacramentum confirmationis nondum receperint, illud, antequam ad matrimonium admittantur, recipiant, si id fieri possit sine gravi incommodo.**

§ 2. Ut fructuose sacramentum matrimonii recipiatur, enixe sponsis commendatur, ut ad sacramenta paenitentiae et sanctissimae Eucharistiae accedant.

§ 1. Catholics who have not yet received the sacrament of confirmation are to receive it before being admitted to marriage, if this can be done without grave inconvenience.

§ 2. So that the sacrament of marriage may be fruitfully received, it is earnestly recommended that spouses approach the sacraments of penance and the blessed Eucharist.

SOURCES: § 1: c. 1021 § 2
§ 2: c. 1033; OCM *Prae* 7

CROSS REFERENCES: —

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In agreement with *CIC*/1917, the two paragraphs of c. 1065 establish two different types of norms: the requirement of receiving the sacrament of confirmation before being admitted to marriage (§ 1), and the earnest recommendation that spouses confess and take communion so as to receive fruitfully the sacrament of marriage (§ 2).

A propos of the first norm, during the work of codification,[1] some consultors actually requested two opposite things: eliminating the confirmation requirement, and on the contrary, claiming the absolute necessity for it and empowering parish priests to administer the sacrament of confirmation before marriage.

The legislator opted to reproduce the norm of *CIC*/1917 literally. It urged the parties to be confirmed before approaching marriage, but not absolutely; only if it were possible without grave difficulty. It is clear that in this way the legislator is showing tactful respect for *ius connubii* by

1. Cf. *Comm.* 9 (1977), pp. 140–141.

not imposing a new hurdle to exercising it when there is grave difficulty in being confirmed, such as for lack of a minister.

With respect to whether the parish priest may confirm in that situation, cc. 882 and 883 on administering the sacrament of confirmation, must be followed.

With respect to the recommendation to receive penance and the Eucharist, there is a small difference between c. 1033 of *CIC*/1917 and the current c. 1065 § 2. The old norm directly imposed the duty upon parish priests to "strongly" (*vehementer*) exhort the engaged couple to confess their sins and piously receive the Eucharist, whereas the current precept directs the recommendation to the parties themselves. Obviously, this does not mean that parish priests, and in general anyone preparing for marriage, do not have the pastoral duty to remind the parties of this recommendation. They must make the future spouses understand that a valid celebration of marriage is not sufficient, but also that the obstacle of sin must be removed for the sacrament to be fruitful. They must also inform the parties that the Eucharist is "the source and summit of every Christian life" (*LG* 11) and that therefore the conjugal community should be built thereon from the beginning.

In any case, this canon is a recommendation to receive the sacrament of marriage fruitfully. Here again, the *ius connubii* appears as a necessary point of reference so as to avoid any obstacle to celebrating the marriage in case the parties do not wish to confess or take communion. Even supposing that the moral category of sacrilege, a sacrament for the living, were applicable to the sacrament of marriage if received without the due dispositions, it should not be used as a pastoral argument to prevent certain parties from celebrating a canonical marriage. This reason would make sense only if one assumed the separability of marriage and sacrament, that is, if a non-sacramental marriage between baptized persons were accepted. If we assume an inseparability, the basis of c. 1055, to avoid sacrilege the parties would have to be induced to live in an unmarried relationship, which would involve a greater evil.

1066 **Antequam matrimonium celebretur, constare debet nihil eius validae ac licitae celebrationi obsistere.**

Before a marriage takes place, it must be established that nothing stands in the way of its valid and lawful celebration.

SOURCES: c. 1019 § 1; SCDS Instr. *Iterum conquesti*, 4 iul. 1921 (*AAS* 13 [1921] 348–349); SCDS Instr. *Sacrosanctum matrimonii*, 29 iun. 1941 (*AAS* 33 [1941] 297–318)

1067 **Episcoporum conferentia statuat normas de examine sponsorum, necnon de publicationibus matrimonialibus aliisve opportunis mediis ad investigationes peragendas, quae ante matrimonium necessaria sunt, quibus diligenter observatis, parochus procedere possit ad matrimonio assistendum.**

The Bishops' Conference is to lay down norms concerning the questions to be asked of the parties, and concerning the publication of marriage banns or other appropriate means of enquiry to be carried out as a pre-requisite for marriage. When he has carefully observed these norms the parish priest may proceed to assist at a marriage.

SOURCES: c. 1020; SCDS Instr. *Sacrosanctum matrimonii*, 29 iun. 1941 (*AAS* 33 [1941] 297–318

1068 **In periculo mortis, si aliae probationes haberi nequeant, sufficit, nisi contraria adsint indicia, affirmatio contrahentium, si casus ferat etiam iurata, se baptizatos esse et nullo detineri impedimento.**

In danger of death, if other proofs are not available, it suffices, unless there are contrary indications, to have the assertion of the parties, sworn if need be, that they are baptised and free of any impediment.

SOURCES: c. 1919 § 2; SCDS Instr. *Iterum conquesti,* 4 iul. 1921, 4 (*AAS* 13 [1921] 348–349)

CROSS REFERENCES: —

COMMENTARY

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1. In addition to pastoral means to prepare appropriately for the fruitful celebration of a marriage, canon law establishes a number of juridical prerequisites designed to discover if the parties are free and that there are no obstacles to a valid and lawful celebration of marriage. Only then will the marriage be legitimate and only then can the parish priest assist.

This set of informative measures in c. 1066, such as the questions to be asked of the parties or the publication of the banns, is carried out formally in the so-called "marriage records," which have two purposes: *a)* They are the technical and formal instrument by which a record is made of the results of the prenuptial inquiry made to ensure a valid and lawful celebration of the marriage. *b)* They are the legal record indicating that the marriage was effectively celebrated, giving the date and place, and the name of the parish priest or delegate who assisted.

2. *CIC*/1917 regulated all this material in detail, whereas c. 1067, in contrast, authorizes the Bishops' Conferences to issue the appropriate norms on the questions to be asked of the parties and on the most suitable means, whether or not they are called banns, to carry out the inquiry that must *necessarily* precede marriage. Therefore, the questions are universally obligatory. The task of particular legislation is only to establish the means or technical instruments for carrying them out. The decentralization of the normative process in this area seems in every way appropriate because the particular legislator is closer to the uses and customs of each nation. Yet, considering that marriages are often celebrated between parties from different dioceses in a country, it also seems positive and useful to assign jurisdiction to the Bishops' Conferences. The unification of criteria and modes of action in this matter simplifies interdiocesan juridical and administrative activity while it avoids any confusion in the faithful that might be caused by a variety of uses and procedures.

3. There can be no question that marriage records are juridically obligatory, considering that they are the formal instrument recording the questions asked of the parties and the results of the publication of the banns. Only in danger of death, and not in other cases of urgent celebration, does the ordinary procedure of proof yield to the extraordinary

measure established in c. 1068, which makes clear that a statement by the parties that they are baptized and free of impediments suffices. In other cases the parish priest or whoever assists at the marriage must comply with the prescriptions of the law (universal or particular) to prove that there is no impediment to the valid or lawful celebration of the marriage. The parties, however, are not so obligated; consequently, it has never been considered to be a lawful limitation on *ius connubii*, but rather a guaranty that the right is properly exercised.

4. Since it is the Bishops' Conferences whose task it is to establish the specific methods of proof, it is appropriate to set forth here, as an example, the decisions of the Spanish Conference of Bishops. In art. 12 of the Decree of November 26, 1983, which took effect on July 7, 1984, the following were established: "1) Implementing c. 1067, a marriage record shall be drawn up that includes the questions put to the parties and the witnesses, indicated in the appendix to this Decree (appendix 2); 2) In addition, the banns shall be published by an edict posted on the Church doors for a period of fifteen days or, where it is the tradition, the customary banns shall be read on at least two feast days."

Appendix 2 referred to by the norm is a "draft model marriage record." Among the items in it (the personal data of the parties, canonical impediments, matrimonial consent, proof of sufficient prematrimonial formation, either in organized courses or personal attention, dispensations and licenses, marriage banns) there is no reference to the faith of the parties. Only in the questions asked of the witnesses, are they asked to respond whether there are any of the cases found in c. 1071 and if the parties are believers or completely separated from the Church.

Although the Bishops' Conference intended theirs to become the "model" marriage record for Spanish dioceses, the fact is that other model records are in circulation, with important and significant differences, especially in relation to the questions for the parties. Up until 1988, for example, in some dioceses a model record was in use in which each party, questioned separately and after swearing an oath on the Bible, had to answer ten specific questions. The first one was "Are you a believer so that you can request a sacrament? Do you accept marriage as a sacrament with its essential properties (unity and indissolubility)"? Later, another model came into use, without the oath requirement, and the questions were replaced by a statement the parties must make that includes the following: "That, upon my faith, I am sure that through the sacrament of marriage God is committed to us and will bless our future life and our efforts to achieve a greater love, justice and peace among men."

This type of declaration offers no difficulties to the future spouses if they are indeed Christians. But a problem arises if they lack the faith demanded in the statement. Should they then on principle be denied marriage?

Preparation for marriage should indisputably tend to form the engaged couple in the Christian path with respect to the content and general experience of faith and with respect to the meaning of the sacrament of marriage. The Pope has said that is why it is the primary duty of pastors "to bring about a rediscovery of this faith and to nourish it and bring it to maturity. But pastors must also understand the reasons that lead the Church also to admit to the celebration of marriage those who are imperfectly disposed" (*FC* 68).

Thus in the preparation stage it is a pastoral obligation to inquire about the level of faith of the parties, so as to develop it and grow it as much as possible in order for the fruit of the sacrament to be more abundant. It is not so certain that the level of faith must be asked with the obligation to answer in the formal marriage record, because faith is not a requirement for a valid and juridically lawful celebration of the marriage covenant between baptized persons, which is the raison d'être and ultimate objective of the marriage record.

If we accept that every human being (including baptized persons) has the fundamental capacity to know and wish for a true marriage regardless of internal faith, there are two possibilities. The inseparability of marriage and sacrament is denied, that is, that the sacrament of marriage is the same marriage covenant among the baptized, instituted by the Creator "in the beginning." Or, on the contrary, the conclusion is that a lack of faith in itself can only be a remote cause for nullity because of its possible influence on consent. It should not, then, be invoked as an obstacle to prevent celebration of the marriage-sacrament by the party who makes "the decision to commit his entire life to a indissoluble love and unconditional faithfulness in his respective marital consent (*FC* 68). Otherwise, such a measure, intended to be pastoral, would lead to a grave injustice by constituting an impediment for exercising the right to enter into the marriage-sacrament, the only marriage possible for a baptized person.

1069 **Omnes fideles obligatione tenentur impedimenta, si quae norint, parocho aut loci Ordinario, ante matrimonii celebrationem, revelandi.**

Before the celebration of a marriage, all the faithful are bound to reveal to the parish priest or the local Ordinary such impediments as they may know about.

SOURCES: c. 1027

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Although marriage is configured as an interpersonal relationship, it has an undeniable social relevance, among other reasons because the authentic family is based upon marriage, and the family is a vital cell of society and of the ecclesial community

In the light of this social dimension, the purpose of publishing the banns or other means of inquiry that may be established by particular law, is to publicize the nuptials that are to be celebrated so that other members of the community may be informed and may contribute to ensure that nothing stands in the way of celebrating the marriage. That is the context of the obligation imposed by c. 1069 on all faithful to inform the parish priest or the local Ordinary of any impediments of which they may be aware. There is thus a direct relationship between publishing the banns and the obligation. In that respect, it is pastorally healthy that in the proclamation or announcement of marriage the faithful are informed that it is proper to pray for the future spouses and to share the happiness of the coming nuptial feast. But the primary objective of the banns is to publish the nuptials and invite the faithful to fulfill their obligation to reveal any impediment opposed thereto.

There are two things meant here by impediment. The canon refers either to the impediments technically described in the Code or to any type of impediment that might nullify the celebration of marriage, including impediments deriving from the lack of true consent (for example, a manifest reservation of divorce). In any case, the obligation of the faithful can only include clearly objective impediments or causes for possible nullity. Furthermore, they cannot be known or easily discoverable by the parish priest.

When the time comes to fulfill this duty, perhaps the natural precept may be invoked that "No one may *unlawfully* harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy" (c. 220). But note that c. 220 is speaking of *unlawful* harm, which means that there may be reasons of a higher order that make it lawful. Such is the case of the validity of marriage, considering its personal and social importance.

1070 **Si alius quam parochus, cuius est assistere matrimonio, investigationes peregerit, de harum exitu quam primum per authenticum documentum eundem parochum certiorem reddat.**

If someone other than the parish priest whose function it is to assist at the marriage has made the investigations, he is by an authentic document to inform that parish priest of the outcome of these enquiries as soon as possible.

SOURCES: c. 1029; SCDS Instr. *Iterum conquesti,* 4 iul. 1921, 2 (*AAS* 13 [1921] 348–349)

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Ordinarily the person responsible for carrying out pre-matrimonial investigations is the parish priest who is to assist at the marriage. But it may happen that another person performs the task, in which case the Code establishes that the parish priest responsible must be informed of the results of the investigation as soon as possible in an authentic document. This is not an attempt to settle any conflict between parish priests, but to return the inquiry made by another person to the priest ordinarily responsible for conducting it. The problem appears when it must be determined who the parish priest to assist at the marriage will be and consequently be responsible for performing the inquiry.

Universal law sets forth only some general principles on the matter. Canon 1115 establishes that the parish where the marriages are to be celebrated is the one where one of the parties has a domicile or quasi domicile, or one month's residence. With permission from the Ordinary or their own parish priest, however, they may celebrate their marriage in a different place.

In any case, assistance by the parish priest at a marriage celebrated in his own parish is always valid even if the parties are not his subjects (c. 1109).

In the light of those principles, it must be particular norms, especially diocesan norms, that determine the details for handling marriage records and who is responsible for them.[1]

1. Cf. L.M. García, "La función del pároco en la preparación del matrimonio," in *Ius Canonicum* 29 (1989), p. 531.

1071 **§ 1. Excepto casu necessitatis, sine licentia Ordinarii loci ne quis assistat:**

1° matrimonio vagorum;

2° matrimonio quod ad normam legis civilis agnosci vel celebrari nequeat;

3° matrimonio eius qui obligationibus teneatur naturalibus erga aliam partem filiosve ex praecedenti unione ortis;

4° matrimonio eius qui notorie catholicam fidem abiecerit;

5° matrimonio eius qui censura innodatus sit;

6° matrimonio filii familias minoris, insciis aut rationabiliter invitis parentibus;

7° matrimonio per procuratorem ineundo, de quo in can. 1105.

§ 2. Ordinarius loci licentiam assistendi matrimonio eius qui notorie catholicam fidem abiecerit ne concedat, nisi servatis normis de quibus in can. 1125, congrua congruis referendo.

§ 1. Except in a case of necessity, no one is to assist without the authorization of the local Ordinary at:

1° a marriage of *vagi;*

2° a marriage which cannot be recognised by the civil Law or celebrated in accordance with it;

3° a marriage of a person bound by natural obligations towards another party or children, arising from a previous union;

4° a marriage of a person who has notoriously abandoned the catholic faith;

5° a marriage of a person who is under censure;

6° a marriage of a minor whose parents are either unaware of it or are reasonably opposed to it;

7° a marriage to be entered by proxy, as mentioned in Can.1105.

§ 2. The local Ordinary is not to give authorization to assist at the marriage of a person who has notoriously rejected the catholic faith unless, with the appropriate adjustments, the norms of Can. 1125 have been observed.

SOURCES: § 1,1°: c. 1032; SCDS Instr. *Iterum conquesti,* 4 iul. 1921, 4 (*AAS* 13 [1921] 348–349)
§ 1,4°: c. 1065; SCHO Decl., 11 Aug. 1949 (*AAS* 41 [1949] 427–428)

§ 1,5°: c. 1066
§ 1,6°: c. 1034
§ 1,7°: c. 1091
§ 2: c. 1065 § 2

CROSS REFERENCES: —

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1. This canon lists a number of cases in which the parish priest or delegate is prohibited from assisting at a marriage without prior authorization from the local Ordinary, except in case of necessity. Thus there are two duties involved: the parish priest's duty to request authorization to assist at the marriage, and the local Ordinary's duty to grant or deny authorization after examining the case.

This is a precautionary measure that works in the following manner. It limits the parish priest's authority to assist lawfully at a marriage celebrated in his jurisdiction, the question of validity in no way enters into the picture. The case is sent up to diocesan jurisdiction, to the local ordinary, so that an adequate response may be given from that jurisdiction to the problems that the case causes and so that marriage or other values that might be at stake are protected.

Although in some of the cases set forth, the cautionary norm may be justified by maximizing all measures to ensure a valid and lawful celebration of marriage, that is not the ultimate reason, the *ratio legis,* behind this norm as a whole. With recourse to the administrative instrument of authorization, the general idea is that, for problems raised by certain marriages, the decision should fall not only on the parish priest; the local ordinary must be made aware of the problems, and thus all proceed with more prudence and caution before the marriage is celebrated. Apart from the general *ratio legis*, we can speak of as many specific reasons as different cases are covered in the norm. This is a question of no small importance, because the key to a correct interpretation of the law is in a clear individuation of the *ratio legis.*

2. Seen from another angle, the norm established by c. 1071 involves a prohibition that directly affects the parish priest or other assisting priest, but not the parties themselves. In addition, it is a prohibition from assisting at a marriage without prior authorization, for the purpose, mentioned above, of bringing the problems that the marriage in question raises to the attention of the diocesan authority and receiving a response

to them. Thus the prohibition is in no case stated as an impediment to marriage, neither diriment nor impedient, in classic terms. If a marriage were celebrated without the prescribed authorization, it would still be valid and lawful. Only assisting at it would be unlawful. On this matter, see the difference between the literal sense of c. 1071 ("no one is to assist without the authorization of the local ordinary"), and c. 1124, referring to a mixed marriage ("without the express authorization of the competent authority, marriage is prohibited").Relative to this is c. 1106 on a marriage contracted through an interpreter, at which the parish priest may not assist unless he verifies the trustworthiness of the interpreter. This too is a prohibition against assisting at the marriage, but in this case the requirement of prior authorization is missing because the reason for the prohibition is different from the generic reason in c. 1071.

We could cite many other cases which would also require authorization from the local ordinary, not only for lawful assistance, but for lawful celebration. For example, celebrating a marriage in secret (c. 1130), or celebrating a marriage subject to a past or present condition without written authorization from the local ordinary (c. 1102 § 3). Finally, c. 1077 grants the local ordinary the power to prohibit the marriage of his subjects in a specific case, but only temporarily, for grave cause so long as it lasts. These cases are true prohibitions, as are the *vetita* of nullity decisions, but they are not the same as the prohibition against assisting at a marriage as given in c. 1071.

3. In the cases listed in c. 1071, the prohibition against assisting at a marriage without authorization from the local ordinary excepts cases of necessity, in which the *ius connubii* prevails over any administrative impediment.

With respect to the scope of cases of necessity, during the work of codification, a proposal was explicitly rejected in which only in *danger of death* could a parish priest lawfully assist at a marriage without prior authorization from the local ordinary.[1] That makes it clear that cases of necessity need not be limited to danger of death, nor even to cases of *urgent need*. Rather a concept of relative necessity should be taken into consideration, relative to the value being safeguarded through recourse to diocesan jurisdiction, and relative to the fundamental right, the exercise of which is being limited. If a case of need should indeed be verified, a parish priest may assist at the marriage without the preceptive authorization, but that does not exempt him from trying to resolve himself any problems arising from the case. If there is no such need, as we stated above, he must request authorization, which is a way of transferring handling of the problem to the local ordinary. Thus it has been rightly written that "granting authorization by the Ordinary is not a formality; it cannot be converted

1. Cf. *Comm.* 9 (1977), p. 143.

into a kind of automatic procedure: request, followed by authorization. The ordinary must take into account all the pastoral aspects of the case and consequently, grant or deny assistance."[2] But among the pastoral aspects, *ius connubii* must not be overlooked. The proper balance must be found between the value being safeguarded and the right to enter into marriage, for in exercising that right effectively and opportunely, the *salus animarum* is often involved. In the end, denial of authorization to assist at a marriage implies in practice the temporary prohibition covered in c. 1077, under which the problem would have to be resolved.

Although he was referring to the case of a minor, López Alarcón[3] brought up a fact that is applicable to other cases. According to the illustrious canonist, the juridical relationship established between the local ordinary and the person who must assist at the marriage is of a public nature and concludes with a singular administrative decree (the license) that will authorize or prohibit celebrating the marriage. And now an interesting situation arises. In the case cited by the author, "the parents and child are not subject to said relationship, but they are an interested party. Therefore they may legitimately exercise the corresponding recourses and must be notified of the decree." If authorization is denied, even legitimately and after weighing the facts, there is still an indirect limitation of exercising the *ius connubii*; therefore there is a juridical basis for the possibility of appealing the denial of authorization in at least some of the cases covered by c. 1071.

4. With regard to the list of cases included in c. 1071, many of them were covered in *CIC*/1917, although dispersed. Others are new cases, taken from the new social reality to which canon law has become sensitive. Such are the cases of a marriage that cannot be recognized or celebrated under civil law, or the marriage of someone bound by natural obligations toward another party or children. There is even a case, such as in no. 4°, that while not new in comparison with *CIC*/1917, today acquires special relevance because so much of society is de-Christianized. This is demonstrated by the fact that a good many commentaries on c. 1071 center attention on pastoral problems caused by the lack of faith of the parties.

1°. *Marriage of "vagi."* Canonically, a *vagus* is a person without a domicile or quasi domicile in any place (c. 100). In this circumstance, with the instability of life involved, the precautionary measure of requesting authorization from the ordinary so as to ensure as well as possible a valid and lawful celebration of marriage is advisable. In such a case, the

2. Cf. J.L. ACEBAL LUJÁN, "Casamiento de aquellos cuyo matrimonio no puede ser reconocido o celebrado según la ley civil," in *El matrimonio. Cuestiones de Derecho administrativo-canónico (IX Jornadas de la Asociación Española de Canonistas)* (Salamanca 1990), p. 110.

3. M. LÓPEZ ALARCÓN, "El matrimonio de los menores (cc. 1071.1, 6°, 1072 and 1083.2)," in *El matrimonio. Cuestiones...*, op. cit. p. 173.

principal purpose of the norm has always[4] been the need to avoid entering into a null marriage, mainly because of the impediment of *ligamen*, which in the case of a *vagus* may be easily hidden.

Perhaps that is the reason the Instructions of the SCDS of July 4, 1921 and June 29, 1941[5] extend the norm on *vagi* to the marriage of emigrants or immigrants.[6]

Also for that reason, in the diocese of Madrid, for example, authorization to assist at marriage is not only required for *vagi* in the canonical sense under c. 100, but for many other persons who, even though they have a proper domicile or quasi domicile, temporarily reside in Madrid. Such is the case of immigrants passing through, exiled persons or refugees bound for a third country, and non-residents in seasonal activities. This category includes artists, employees of lotteries and recreational games, seasonal workers, businessmen, even government employees temporarily assigned to the capital of the country.[7]

2°. *Marriages that cannot be recognized or celebrated under civil law.* This is a new case that was not included in *CIC*/1917. By introducing this case into those that require authorization from the local ordinary, the legislator no doubt wished to emphasize respect and esteem for civil law and to avoid as much as possible any conflicts between canon law and civil law in a matter of such social importance for both the Church and State. The main reason for this precautionary measure, its most important purpose, is to ensure to the maximum the civil effects of every canonical marriage.

The reference to two situations, that is, the impossibility of having the proposed marriage *recognized* or *celebrated* under civil law, is doubtless because the canonical legislator anticipates that there will be two types of civil marriage. Theoretically at least, according to the facultative system, the State recognizes the civil effects of a canonical marriage, although for full recognition the marriage must be registered in the Department of Vital Statistics. In the obligatory civil system, the civil effects of a canonical marriage come into play only after a civil celebration of the marriage, either before or after the canonical ceremony. In any case, the basic problems remain the same: the Church wishes the best insurance that a canonical marriage between her faithful will be fully recognized by the civil system. For this case it specifies the system of obtaining authorization from the ordinary before proceeding with the celebration of a marriage that may conflict with civil law. Until the conflict is resolved, and

4. Cf. SCCouncil, March 28, 1908, in *AAS* 41 (1908), p. 281; c. 1032 *CIC*/1917.
5. *AAS* 13 (1921), pp. 348–349, 4 a); *AAS* 33 (1941), p. 303, no. 6.
6. Cf. J.M. GONZÁLEZ DEL VALLE, *Derecho canónico matrimonial* (Pamplona 1983), p. 156.
7. Mons. L. GUTIÉRREZ, auxiliary bishop of Madrid, *Discurso de clausura* (of the IX Jornadas de la Asociación Española de Canonistas), in *El matrimonio. Cuestiones*... op. cit., p. 210.

personal, patrimonial, social and labor rights of the Christian spouses are ensured, the ordinary is on principle obligated to deny authorization to assist at the marriage. Since the validity of a canonical marriage is not at stake, only its civil effects, there will be times when the local ordinary should grant authorization to assist at a marriage that cannot be celebrated or recognized under civil law.

Certainly, the civil effects are very important in the social life of the spouses, but sometimes the *ius connubii* and the *salus animarum* can prevail. There may also be another reason. "The Church cannot adopt a servile attitude toward the State, giving the also impression that at least implicitly, it admits the superiority of civil law over the Church's law or over natural law itself."[8] That would be the case if under no circumstances was authorization to marry given because the marriage could not be recognized by the State.

There are many possible conflicts between the two systems that prevent full recognition of the civil effects of canonical marriage and that therefore make it necessary for the parish priest to request authorization from the ordinary.An example would be an attempt made to enter into canonical marriage with a dispensable civil impediment. In that case, before proceeding with the canonical marriage, a dispensation from the civil impediment must be requested so that the canonical marriage can be recognized by the State, be registered and receive all civil effects.

More serious problems arise if there is a non-dispensable civil impediment. The most frequent case, with the greatest civil and canonical importance, is the impediment of a bond not dissolved by divorce. In the canonical world, a civil marriage of a Catholic obligated to canonical form is null. And so if the Catholic wishes to marry another person canonically, the new marriage would be valid in the eyes of the Church, but could not be registered civilly, nor would the State recognize it due to the impediment of prior bond. Only after a civil marriage is dissolved by divorce does the problem of assisting at the marriage disappear. If, however, there is no proof of dissolution of the prior bond, the parish priest will have to approach the ordinary, who, on principle, cannot grant authorization, since such a canonical marriage would have no civil effect and cause all the attendant social problems. There may also be higher reasons that justify granting authorization.These include the fact there is no possibility of obtaining a divorce and therefore, it cannot be registered nor produce civil effects.

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8. J.L. ACEBAL, "Casamiento de aquellos cuyo matrimonio no puede ser celebrado o reconocido según la ley civil (c. 1071 §1,2°)," in *El matrimonio. Cuestiones*..., cit., p. 112.

In the work of revising the Code,[9] a request was made to insert the impediment of a civil bond in the new canon law. But the Commission deemed that the guarantee established in c. 1071 § 1, 2° was sufficient.

Another case where a canonical marriage would not be recognized civilly is the following: a canonical marriage registered in the Bureau of Vital Statistics produces full civil effects. Among them is the impediment of prior bond in case a new marriage is attempted. Consequently, for the impediment to cease, the canonical marriage registration would have to be canceled or proof attached that it was a null marriage. In that case it is possible for a canonical marriage, civilly registered, to be declared canonically null at a later time. The "spouses" would then be free to enter into a new marriage in the Church. But the new canonical marriage would only be recognizable and have civil effect if the annulment had been ordered and registered by a civil judge, or, if applicable, with a *super ratio* dispensation. Otherwise, we would have a different type of case in which authorization would have to be requested from the ordinary, for it would be a marriage that was not recognizable under civil law. It is another matter that the difficulties in obtaining an *exequatur* from a civil judge for canonical decisions of nullity must be carefully weighed by the local ordinary when deciding whether or not to grant authorization, especially if the difficulties arise as they do in Spain from a conflict between the Juridical Agreement of 1979 and the unilateral reform of the Civil Code.

3°. *Marriage of a person bound by natural obligations toward another party or children, arising from a previous union.* Natural obligations toward another party or children are not an impediment to enter into marriage, since the prior union causing the obligations is not valid and legitimate in the eyes of the Church. In addition, the continuation of the natural obligations does not per se form an obstacle to a valid and lawful celebration of marriage, which the legislator has tried to salvage by means of the recourse to the requirement of authorization from the ordinary.

However, in the legislator's mind, there is no doubt the desire to safeguard justice, Christian charity and natural fairness, as exemplified in the case mentioned in c. 1148 § 3. But this does not seem to be the immediate end of this preventive measure that subjects the marriage of persons with these natural obligations to special vigilance by the ordinary. It seems rather that the legislator is attempting to avoid the scandal attached to trying to enter into a Christian marriage and escape or reject obligations so close to those being taken on in the marriage.

It is obviously important to discern clearly the *ratio legis* of this case. A different interpretation will be given to the concepts of "natural obligations" and "prior union," depending upon which it is. If this cautionary measure was meant directly to reestablish or safeguard the values of

9. Cf. *Comm.* 9 (1977), p. 362.

justice, charity or fairness, any natural obligation arising from any union whether permanent or temporary (for example, children begotten in rape or adultery) would enter into this case. There have been some who think along these lines of broad interpretation, and they are even unhappy that the cautionary measure is not classified as a diriment impediment.[10]

More commonly, however, the purpose of this cautionary norm is attributed to the desire, as much as possible, without unnecessarily destroying the *ius connubii*, to avoid any scandal from assuming the obligations implied by marriage without, additionally assuming the natural obligations arising from a prior union. For the purposes intended by the norm, the term *union*, the source of obligation to the other party and to the children thence born , can be understood only as a union that appears to be somewhat conjugal, but cannot exclude a union based on a merely factitious relationship.[11] Certainly, anyone wishing to approach Christian marriage may be subject to other natural obligations that must be fulfilled out of justice or charity or natural fairness, but that does not mean they are examples of the case in this norm under which a parish priest must request authorization from the local ordinary to assist lawfully at a marriage. This is a cautionary norm that directly affects assistance at a marriage by the parish priest and not so much the marriage itself or the parties thereto.

Among the cases that must be kept in mind by both the parish priest in requesting authorization and the local ordinary in granting it, are the natural obligations that may arise from the irregular unions referred to in *Familiaris consortio* (nos. 80–84): *trial* or experimental marriages, de facto free unions with no juridical ties, civil marriages of persons obligated to marry canonically, and finally, civil marriages of divorced persons, obviously without prior canonical bonds; otherwise we would have the diriment impediment of bond. In this last instance, natural obligations could arise from two civil marriages.

4°. *Marriage of a person who has notoriously rejected the Catholic faith.* This cautionary norm was included in *CIC*/1917 in the chapter on impediments, and was placed immediately after mixed marriages. The latter were serious impediments, but that is not so in this case even though there are many similar reasons justifying both. There were two basic reasons: to forestall and avoid the danger of perversion of the Catholic party or believer, and to ensure the Catholic education of their children. In *CIC*/1917, c. 1065 first made a strong appeal to the faithful to avoid marrying anyone who had notoriously rejected the faith, and second, imposed upon the parish priest the duty to consult the ordinary before assisting at a marriage of that type. The ordinary was to make a prudent judgment as to

10. Cf. M. CALVO TOJO, "Matrimonio de quien esté sujeto a obligaciones naturales nacidas de una unión precedente," in *El matrimonio. Cuestiones...*, op. cit., pp. 137–140.

11. Cf. I. PÉREZ DE HEREDIA Y VALLE, "Cuidado pastoral y requisitos previos a la celebración del matrimonio según el proyecto de nuevo Código," in *Anales Valentinos* 24 (1981), p. 214.

whether in the case "the Catholic education of all offspring was sufficiently ensured and that there was no danger of perverting the other spouse."

This seems a timely reference to the former Code, because, although the drastic de-Christianization of society brings special meaning to this case, still, the purpose of the current norm is identical to that of the former one. Neither the validity nor sacramental nature of the marriage of someone who has notoriously rejected the faith is prejudiced. Thus the cautionary norm of requiring authorization from the ordinary does not seek to protect or guarantee validity, but as much as possible to ensure that the faith of the believer and the children suffers no special risks, just as for mixed marriages. Hence it is the duty of the ordinary, as established in § 2 of c. 1071, not to grant authorization unless the provisions of c. 1125 on mixed marriages are duly adapted and followed.

In the work on codification, it will be remembered, a proposal was made that the marriage of anyone who had notoriously rejected the faith be made a diriment impediment, or at least an effective impediment. The consultors rejected the proposal because even when someone rejects the Catholic faith, the right to enter into marriage is not lost, in this case, marriage as a sacrament, the only marriage possible for a baptized person, considering the principle of the indivisibility of covenant and sacrament. Most consultors also rejected the proposal to make the norm aserious impediment.[12]

In the commentaries on this cautionary norm, authors frequently point out the obvious, that this is a case where one party is a believer and the other has notoriously rejected the faith. They immediately add that if both parties have notoriously rejected the faith, the parish priest himself, without the need to approach the ordinary, must clarify the problem, generally by denying the marriage to avoid the nullity of the sacrament, for the basic idea is that the validity of the sacrament essentially depends upon faith.

It might seem strange that the legislator established a cautionary norm for the case where only one of the parties has notoriously rejected the faith, and does not refer to the case where both parties are unbelievers. It is not so strange, however, if we look at the ultimate reason behind the measure: to help preserve the faith of the believer and the education of the children in the faith.

It is very important for the parish priest who gathers the information for the marriage records to include the state of belief of the parties. If only one is an unbeliever, the duty is for the purpose of fulfilling the obligation to request permission from the local ordinary. If both parties are in this situation, the purpose is to verify whether they are disposed to enter into a

12. Cf. *Comm.* 9 (1977), p. 144.

true marriage, if they have made "in their respective consents the decision to be committed lifelong in indissoluble love and unconditional faithfulness."

Again, it is important to stress that lack of faith in itself, and the request to be married in the Church more for social reasons than really for religious reasons are not sufficient to refuse a marriage. An engaged couple, even though they do not express themselves in terms of faith, do not for that reason *necessarily* lack the right intention. They do not lack the will to enter into a true marriage which may be a sacrament because through baptism, they will be inserted in the spousal covenant of Christ and the Church. In addition, denying them a sacramental marriage is the same as denying them the only true marriage possible for them as baptized persons. "Only if they show signs of *explicitly and formally* rejecting true marriage," adds *Familiaris consortio* 68, that is, "the marriage performed by the Church when it celebrates the marriage of baptized persons," must they be denied this celebration, not because they do not have faith, but for not having the intention to enter into a true marriage.

Finally, it is important to clarify the canonical scope of the term *notorious* rejection of the Catholic faith, mentioned in this case. Notoriety here implies a situation publically known either because the unbeliever's lack of faith has been made public, positive and explicit, or because it is implicit through the affiliation with or membership in manifestly atheistic or anti-Christian groups.[13] In any case, *notorious* rejection is not always the same as *notorious* rejection of religious practices. It would not be legitimate to make the term *non-believer* equivalent to *non-practicer* for the purpose of requesting authorization from the local ordinary. During the work on revising the Code, there were suggestions to add the case of persons not educated in the Catholic faith. But this proposal was rejected because "sub hac categoria venire de facto magnam partem fidelium, quare nimis gravosum esset pro parochis petere licentiam Episcopi pro istis casibus."[14] Something similar would happen with non-practicers, unless there were positive and public manifestations of the rejection of Christian teachings.

Notorious rejection also does not include leaving the Church by *formal act*. Under c. 1117, anyone leaving the Church by formal act is exempt from the obligation of canonical form. However, in addition to the publicity and notoriety of the situation of non-belief, to be exempt there must be a formal act of rejection such as adscription to a non-Catholic confession or a written statement addressed to the parish priest or the local ordinary. In the case at hand, notoriety and publicity about the situation are sufficient, and they do not imply exemption from the obligation of canonical

13. Cf. ibid., p. 145.
14. Ibid.

form, either legally (c. 1117) or by dispensation, as in the case of mixed marriages (c. 1127 § 2).

5°. *Marriage of a person who is under censure.* In c. 1066 *CIC*/1917, the present cautionary measure included not only a person *notoriously* under censure who refuses to confess beforehand or to become reconciled with the Church, but also a public sinner. In both cases, the parish priest was prohibited from assisting at the marriage unless for grave cause, in which case he had to consult with the ordinary if possible.

It is important to look at the old norm to understand better the juridical scope of the present measure. The new canon purposely makes no mention of the case of public sinners. It also does not refer, in describing the case, to a refusal to confess or to become reconciled with the Church as a prerequisite for lawfully assisting at such a marriage. According to the present norm, the prohibition is against assisting at the marriage of anyone under censure, by excommunication or interdict (the censure of suspension affects only the clergy and is therefore irrelevant here), *ferendae* or *latae sententiae*, for the norm does not specify it, nor mention whether *latae sententiae* is declared or not. Now, since a fundamental element of this medicinal penalty is contempt, and if it is eliminated there is a right to absolution (cc. 1347, 1358), then only when contempt persists does the ordinary have to be approached.

What is the ultimate reason behind this recourse to the local ordinary? Why transfer the problem to a higher jurisdiction than that of the parish priest? Since censure, especially excommunication, implies a prohibition against celebrating and receiving the sacraments, it is frequently asserted that the purpose of the precept, of the cautionary measure to which we are referring, is to have the faithful party become reconciled with the Church, absolved of the penalty, and thus eliminate the prohibition against celebrating and receiving the sacrament of marriage.

Of course, the ultimate end of every canonical norm is the *salus animarum*, in this case, reconciliation with the Church and lawful access to the sacraments. It seems to us that the immediate end, of the cautionary measure, is not so much the moral situation of the censured party and its repercussion on lawful access to the sacraments, as it is the juridical and public situation of an important rupture from ecclesial communion and the consequent scandal for the community that celebrating such a marriage would involve. Perhaps for that reason today public sinners are not included in the norm, and perhaps also for the practical difficulty of determining who they are. Besides, authorization from the ordinary is always required when a party is under censure, when contempt persists and the party has not reconciled with the Church.

If contempt persists and therefore the party is still under censure, the old norm prohibited the parish priest from assisting at the marriage with the exception that there was no grave cause, in which case the priest

was to consult with the ordinary to the degree possible. Strictly speaking, the priest's assistance was not subject to the requirement of authorization from the ordinary, but he was free to consulthim about the best way to proceed. Now, requesting authorization is always obligatory before assisting at such a marriage. This could imply that we now have a stricter norm than before. But, looking closely at both, we see that the norm in *CIC*/1917 was in principle more restrictive of the *ius connubii*; unless there were grave cause, the parish priest could not assist at the marriage. Consequently, the *ius connubii* of anyone notoriously excommunicated was limited unless he could invoke grave or urgent cause, or in the last instance, were reconciled with the Church and absolved of censure. In the new norm, the limitation of the *ius connubii* for an excommunicant is not determined by the prohibition against the parish priest's assisting at the marriage, but by the cautionary prohibition of assisting without authorization from the ordinary. This is, in principle, less restrictive of the right to enter into marriage, unless authorization were always refused. Considering the raison d'être of this cautionary norm, that should not happen, for there would always be occasions when the *ius connubii* should prevail over the condition of being under censure and unreconciled with the Church.

This is one more manifestation of the peculiarity of the sacrament of marriage as compared to the Church's other sacraments. One of the effects of censure, as a medicinal penalty, is to prohibit the celebration and receiving of the sacraments. It therefore limits the right of the faithful to the sacraments. The *ius connubii* has its roots reaching down into the very nature of man, it is prior to the condition of the faithful, although affected by it. For that reason the limitation on exercising the right to the sacraments implied by censure, excommunication, is not applicable to the same degree to the right to marriage or to the sacrament of marriage, the only possible marriage for a baptized person even though excommunicated. This norm is based on that peculiarity. The norm would not have been necessary if the legislator had not taken this peculiarity into consideration. Celebration of marriage for an excommunicated person would always be prohibited as a normal effect of the excommunication penalty.

6°. *Marriage of a minor whose parents are either unaware of it or are reasonably opposed to it.* In contrast to other norms regarding the lawful age to marry, which are due to the need for the parties to approach marriage with the required biological and psychological maturity (cf. cc. 1072 and 1083), this canon is based on another reason. If dispensation has been obtained for any impediment, and if authorization to enter into marriage lawfully if the party is under the age set by the appropriate Bishops' Conference, then for the marriage of a minor under 18 years (c. 97 § 1) it is advisable to have parental knowledge and consent. If the parents are unaware of or reasonably opposed to the marriage, a priest may not assist without authorization from the local ordinary.

The reason for this cautionary measure is not to protect marriage so much as the institution of the family; more precisely it is the value of the parent-child relationship that is being safeguarded. Once people believed that parental consent was a condition of the validity of a marriage, but that idea disappeared many centuries ago. Saint Thomas said, "Upon reaching puberty, a free person may dispose of his own person in matters such as making a commitment to enter religion or marriage."[15] Then the Council of Trent reproved anyone who "falsely states that marriages entered into by children without parental consent are invalid and that the parents may make them invalid or null."[16] If a minor has that independence, we must remember that in the nucleus of the Christian concept of family there resides respect, love and obedience among family members. Those values must be shown principally in the request for advice at the time of making serious decisions such as entering into marriage. In principle it is contrary to this spirit of family communion if a child enters into marriage without parental knowledge or in the face of parental opposition. In such a case, as a precaution, canon law sends the problem to the local ordinary, who will have to decide whether to grant authorization after considering the parents' and child's motives.

This issue covers two circumstances: parent's unawareness and their reasonable opposition. With respect to being unaware, we can cite two possibilities. If it is a case of necessity, the priest is exempted from requesting authorization, if it is impossible or very difficult to inform the parents; for example, if their whereabouts are unknown. If it is possible to inform them of their child's proposed marriage, even though the child is trying to hide it from them, then the parents will be able to show their opposition or give their consent. Thus this circumstance leads to the second one, which is more frequent and causes the most canonical and pastoral problems.

These problems especially revolve around how the rationale of the opposition is perceived. The canonical norm expressly requires that the opposition must be reasonable. Therefore, if the parish priest deems the reasons invoked by the parents to be clearly irrational, he has no obligation to approach the ordinary and may assist at the marriage of the minor. Assuming the legal requisites for validity have been fulfilled, the minor has the right to enter into marriage and is free to choose a spouse. To evaluate rationality it is important to ponder carefully not only the parents' reasons, but also the "child's allegations, which may reveal egotistical parental attitudes, hostility towards the family of the other party, and other feelings that cloud the common sense and prudence of decisions."[17] In the

15. *S. Th.*, II–II, q. 88, a. 8 ad 2. Cf. M. LÓPEZ ALARCÓN, "El matrimonio de los menores (cc. 1071,1, 6°, 1072 y 1083.2)," in *El matrimonio. Cuestiones…*, op. cit., pp. 153–181.
16. Cf. *Sess.* XXIV, ch. I.
17. Cf. M. LÓPEZ ALARCÓN, "El matrimonio de menores…," op. cit., p. 174.

end, judgment of the rationality of parental opposition must take into consideration the concrete facts of each case. What in some circumstances may be an irrational reason, in others, may make parental opposition rational. For example, theoretically, it is undeniable that reasons based on social, cultural, racial, religious and similar differences are irrational.[18] Yet in a specific case, considering the condition of the minor, some of these circumstances may cause reasonable parental opposition. They may have merit, then, and authorization from the ordinary may be requested.

7°. *Marriage by proxy.* At one time there were authors who denied the sacramental nature of a marriage celebrated by proxy.[19] This old theory was based on an extrinsic and ritualistic idea of the holiness of marriage. According to this conception, the sacrament of marriage was not the original marriage covenant raised to a sacrament through the baptism of the parties, but something added on to this natural reality by an extrinsic cause. The old and minority-held theory later yielded the thesis of the separability of contract and sacrament, which was repeatedly rejected by the ecclesiastical Magisterium and discipline.

With the doctrine of inseparability there can be no objection to the validity of a marriage by proxy, nor to the sacred nature of such a marriage to the degree that it depends upon the validity of the marriage covenant. *CIC*/1917 also recognized it as valid, although it imposed express conditions for validity (c. 1089) and various precautions (c. 1091) for lawful assistance thereat. The current c. 1104 confirms the previous discipline in the sense that the need for both parties to be present at the same place at the time of consent is ensured also when a proxy provides the party's physical presence after the representational requirements of c. 1105 are fulfilled.

Given that the representation requirements imply the validity of a marriage by proxy, canon law today in every case, and not just if there is time, as in the prior Code, requires that the parish priest or the person assisting at the marriage request authorization from the local ordinary. That is a cautionary measure designed to ensure that the representation requirements are met and thus to ensure the validity of the marriage. In contrast to *CIC*/1917, if today's norm does not expressly mention the *causa justa* for assisting at a marriage by proxy, that does not mean it is not required; it just means that it is *obvious* that it is required.[20]

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18. Cf. I. PÉREZ DE HEREDIA Y VALLE, "Cuidado pastoral...," op. cit., p. 221.
19. Cf., e.g., Cajetan, *Opuscula*, (Venice 1531), t. 2, *De matrimonio*, quaest. I, fol. 44 vto. Cit. and glossed by E. TEJERO, *El matrimonio Misterio y Signo. Siglos XIV–XVI* (Pamplona 1971), p. 158.
20. Cf. I. PÉREZ DE HEREDIA Y VALLE, "Cuidado pastoral...," op. cit., p. 222.

1072 **Curent animarum pastores a matrimonii celebratione avertere iuvenes ante aetatem, qua secundum regionis receptos mores matrimonium iniri solet.**

Pastors of souls are to see to it that they dissuade young people from entering marriage before the age customarily accepted in the region.

SOURCES: c. 1067 § 2

CROSS REFERENCES: cc. 1083

COMMENTARY

Tomás Rincón-Pérez

The age for entering marriage is the object of special attention in canonical marriage law. Thus c. 1083 § 1 sets a certain age as an impediment. Men under 16 years and women under 14 years of age may not validly enter into a marriage unless they obtain a dispensation from the impediment. The purpose is for the parties to enter marriage with the biological and mental maturity that marriage requires and to safeguard *ius connubii*. The goal of achieving a balance between the age of puberty and the right to enter marriage is the reason why canon law does not raise the age for entering into a valid marriage. This canon law is universal; its scope includes very different geographical and cultural areas, in some of which the custom is to marry at a very early age.[1]

Not raising the minimum age for those reasons does not mean that the Church is insensitive to the demands of greater reflective ability and maturity at the time of celebrating a Christian marriage. That is why c. 1083 § 2 gives Bishops' Conferences the power to set a higher age, even if only for the nuptials to be lawful.

Putting this faculty into practice, the CBS has set the age at 18 years for both men and women[2] to agree with the age established by the Spanish civil code.

Apart from the norms that affect validity or lawfulness, depending on the case, c. 1072 recommends that pastors of souls are to dissuade young people from entering marriage before the age customarily accepted

1. Cf. M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de derecho matrimonial canónico y concordado*, 3rd ed. (Madrid 1989), p. 102; J.M. GONZÁLEZ DEL VALLE, *Derecho Canónico Matrimonial, según el Código de 1983* (Pamplona 1983), p. 27.
2. Cf. *BOCEE* 3 (1984), p. 103.

in the region. With this pastoral recommendation, the Church is aiming at keeping the universal legal minimums, intended to safeguard universal values such as *ius connubii*, from undermining the appropriate accommodation to the cultural environment of the region where the marriage is being celebrated.

CAPUT II
De impedimentis dirimentibus in genere

CHAPTER II
Diriment Impediments in General

1073 **Impedimentum dirimens personam inhabilem reddit ad matrimonium valide contrahendum.**

A diriment impediment renders a person incapable of validly contracting a marriage.

SOURCES: c. 1036 § 2

CROSS REFERENCES: cc. 10, 11, 14, 15, 18, 85–93, 1057 § 1, 1058, 1059, 1074–1094

COMMENTARY

Juan Fornés

1. *Notion of impediment*

We shall leave aside the history and doctrine of "impediments." It does not seem necessary to stop here and discuss the meaning of this broad and imprecise term found in legislation prior to *CIC*/1917 and its more restricted and technical use in *CIC*/1917.[1] It had been used to designate a set of circumstances that prevented a person from entering into a valid or lawful marriage. These restrictions on exercising the *ius connubii* (cf. c. 1058), were minutely detailed by the legislator. Thus, as

1. Cf., e.g., J. FORNÉS, "Los impedimentos matrimoniales en el nuevo Código de Derecho canónico," in *Estudios de Derecho canónico y de Derecho eclesiástico en homenaje al prof. Maldonado* (Madrid 1983), pp. 99–128; idem, *Derecho matrimonial canónico*, 2nd ed. (Madrid 1994), pp. 50ff, with the bibliographical references contained therein.

frequently emphasized by doctrine,[2] they had to be exceptional in nature, explicit in the law and strictly interpreted.

As we said, these restrictions affected the validity or lawfulness of a marriage. This explains the fundamental division found in *CIC*/1917, c. 1036, between impedient impediments (which affected lawfulness but not validity) and diriment impediments (which affected validity).

At the beginning of the preparatory work on the new Code, this same division was maintained, although the term "impedient" impediments was changed to "prohibitive" impediments. However, after suggestions from consulting bodies and discussions in the study group on marriage law,[3] it was decided to eliminate the "prohibitive" impediments (which had been finally reduced to three in the draft submitted for study: temporary public vow of perfect chastity, legal relationship if such was a civil impediment, and mixed religion).

In the opinion of the consultors who supported this solution, the main reason was that "they have effect only in the moral order"[4] since, in the juridical order their only effect "consists in that the parish priest may lawfully refuse to assist at the marriage."[5] On the other hand, the consultors in favor of maintaining these impediments emphasized their "pedagogical function," which leads those affected by them "to desist from contracting marriage."[6]

Without entering into all the questions raised by this problem, we may still emphasize that canonical imperatives that do not imply that contrary acts are null may not be simply considered as juridically excluded. That would be the same as reducing canon law to the norms that, according to c. 10, are called invalidating or incapacitating. Let us not forget that canonical unlawfulness also has the effect of designating an act as contrary to ecclesiastical discipline, not only internally, but also in the Church's social order; thus it may even include penal consequences. Apart from that clarification, which appears doctrinally necessary, it is in any case evident that the revision Commission wished to make a clearer distinction between morality and law. Perhaps with arguable justification, they related that distinction to the distinction between the internal forum and the external forum. This idea was already present at the beginning of the Commission's task in the second of the "guiding principles for revising the Code."[7]

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2. Cf., e.g., A. BERNÁRDEZ CANTÓN, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), p. 54; J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III/1, *Derecho matrimonial* (Pamplona 1973), p. 317.
3. Cf. *Comm.* 9 (1977), pp. 132ff.
4. Cf. ibid., p. 134.
5. Cf. ibid.
6. Cf. ibid.
7. Cf. *Comm.* 1 (1969), p. 79.

That having been said, what is certain is that in the current Code, the prohibitive impediments have been eliminated.[8] Strictly speaking, that makes the term "diriment" superfluous where it is added in the corresponding headings[9] or in this canon. The term was fully significant in the juridical system of *CIC*/1917; but according to the present way of looking at it, if we have an impediment, strictly speaking, it affects the validity of a marriage; otherwise it would not be an impediment in the legal sense. Thus the term "diriment" has become an adjective that needs to be explained in the light of the antecedents to which we have summarily referred.

That does not mean, however, that in the current juridical marriage system there are no prohibitions affecting the lawfulness and not the validity of a marriage; for example, the cases covered in cc. 1071 and 1124ff, or in c. 1083 § 2. But technically speaking, those prohibitions should be called *obstacles* or *legal prohibitions* and not impediments in the strict sense.[10]

2. *Juridical nature*

The Code begins the regulation on impediments by stating that they *incapacitate* a person for validly contracting a marriage.

We can see that the legal precept being discussed here seems to suggest a solution to the long doctrinal discussion, theoretically very subtle, but perhaps not so practical, on whether impediments are incapacities, incompatibilities, legal prohibitions or an absence of legitimation.[11] The canon clearly emphasizes that an impediment "incapacitates" a person; it makes a person unable to enter validly into marriage. However, sometimes the incapacity is just that (for example, in absolute impotence). At other times, it really is a question of absence of legitimation (for example,

8. Cf. also *Comm.* 10 (1978), p. 126.

9. Headings of chaps. II and III, tit. VII, pt. I, *Liber* IV. Cf. the reference to *Comm.* 9 (1977), p. 359.

10. Cf., e.g., M. LÓPEZ ALARCÓN-R. NAVARRO-VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), p. 94.

11. Among others who reflect this controversy and adopt personal criteria for it are, J.M. MANS, *Derecho matrimonial canónico*, I (Barcelona 1959), pp. 74–82; J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III/1, *Derecho matrimonial* (Pamplona 1973), pp. 326–327; A. BERNÁRDEZ CANTÓN, *Compendio de Derecho matrimonial canónico*, 7th ed., Madrid 1991, pp. 54–55; M. LÓPEZ ALARCÓN-R. NAVARRO-VALLS, *Curso*..., cit., pp. 94–95. In these works or in that of J. FORNÉS, *Derecho matrimonial*..., op. cit., one can find ample bibliographical references regarding this debated question.

in the impediments of bond, disparity of worship, sacred order, abduction, crime, etc.).

What is most important from the practical point of view is not the exact adjective for the juridical nature of these obstacles, for they are, in the end, the result of a legal classification, with all the underlying historical and doctrinal changes; what is important is that a marriage so contracted is null and void.

1074 Publicum censetur impedimentum, quod probari in foro externo potest; secus est occultum.

An impediment is said to be public, when it can be proved in the external forum; otherwise it is occult.

SOURCES: c. 1037; CodCom Resp. II, 25 iun. 1932 (*AAS* 24 [1932] 284); SCDS Resp. 3, 1 apr. 1957

CROSS REFERENCES: cc. 1073, cc. 1075–1094, 1156–1165, 1526–1586, 1674, 1678–1680

COMMENTARY

Juan Fornés

1. *Classification of impediments*

This canon makes the distinction between public and occult impediments and literally repeats the text of c. 1037 of *CIC*/1917. If we carefully examine the rest of the regulations on the subject, we can see that the legal classification of impediments has been practically reduced to these two kinds.

In addition to the elimination of the relative distinction between prohibitive and diriment impediments (see commentary on c. 1073), the division between major and minor impediments found in c. 1042 of *CIC*/1917 has also disappeared. Thus the new general regulation is much simpler and more linear in comparison to the regulation in the prior legal corpus.

There are other important classifications that could be made from a doctrinal perspective, such as by origin (impediments by divine law and by human law) or by scope and duration (absolute versus relative impediments, or perpetual versus temporary impediments) by their relation to dispensation (dispensable or non-dispensable impediments). As emphasized above however, the Code refers expressly to the distinction between public and occult impediments.

2. *Public and occult impediments*

According to the text of the canon, which is the same as the prior Code, an impediment is public or occult not depending on it being de facto divulged, but depending on the possibility of its being proved in the

external forum. In other canons (e.g., cc. 1080 § 1, 1082), the term "occult" appears to have its ordinary meaning, which is that there is neither divulgation nor the risk of divulgation.

A Response by the CPI of December 28, 1927 is still of interest for this subject, in relation to the "occult cases" in c. 1045 § 3 of *CIC*/1917. According to the Response, those cases "should be judged not only as occult impediments, by nature and in fact, but also as impediments that are public by nature and remain occult in fact.[1]

In addition, there were difficulties of interpretation in the method of *CIC*/1917 that were caused when c. 1037 (which made the distinction mentioned above between public and occult impediments) was considered in relation to c. 1971 § 1, 2° on the procedural part (which spoke of "impediments that are public by nature"). Those difficulties disappear in the new regulation, since c. 1674 uses the expression "when the nullity of the marriage has already been made public."

1. Cf. *AAS* 20 (1928), p. 61.

1075 **§ 1. Supremae tantum Ecclesiae auctoritatis est authentice declarare quandonam ius divinum matrimonium prohibeat vel dirimat.**

§ 2. Uni quoque supremae auctoritati ius est alia impedimenta pro baptizatis constituere.

§ 1. Only the supreme authority in the Church can authentically declare when the divine law prohibits or invalidates a marriage.

§ 2. Only the same supreme authority has the right to establish other impediments for those who are baptised.

SOURCES: § 1: c. 1038 § 1
§ 2: c. 1038 § 2

CROSS REFERENCES: cc. 330–367, 1058, 1073, 1074, 1076–1094

COMMENTARY

Juan Fornés

1. *Introduction*

In establishing impediments it is necessary to distinguish between the simple "declaration" of impediments that are from divine law and the "constitution," or establishment proper, of other impediments from human law by the ecclesiastical authority with jurisdiction. It is also necessary to keep in mind that these other impediments are exceptional in nature, that express consistency must be maintained and that interpretation must be strict because of the nature of the limitations upon exercising *ius connubii* (see commentary on c. 1073).

2. *Declaration of impediments*

After different proposals and suggestions for eliminating impedient impediments (see commentary on c. 1073), the text of § 1 is similar to the corresponding text of c. 1038 of *CIC*/1917. The only outstanding modification is the substitution of *prohibits* for *impedes.*[1] Thus, it is definitely

1. Initially the term *impedientes* had been changed to *prohibentes*; see commentary on c. 1073.

indicated that only the supreme authority of the Church may authentically declare when divine law invalidates or prohibits marriage.

3. *Establishment of impediments*

The establishment of impediments, referred to in § 2, merits further consideration. The question gave rise to numerous suggestions and to a detailed analysis within the study group of the revision Commission.[2] It was first proposed that the Bishops' Conferences, "taking into account the individual circumstances of each place," might also establish "individual prohibitive or diriment impediments."[3] After the various consultations and opposing opinions were heard, it was decided to submit the matter to the Plenary Session of Cardinals who, at their meetings of May 24/27, 1977, issued their decision that the faculty of establishing impediments *neque dirimentia neque impedientia* should not be given to the Bishops' Conferences.[4]

The difficulties that would have arisen in marriage discipline if the initial suggestions had prospered are obvious. Among them is the plurality of kinds of juridical systems in the different regions, which would create unnecessary complications. In view of that, it appears quite logical that such a delicate matter should be reserved to the supreme authority so that there may be a unified system that would no doubt benefit juridical security, as doctrine has emphasized.[5] This is what the new Code has done by maintaining, on this point, the discipline already established in c. 1038 § 2 of *CIC*/1917.

2. Cf. *Comm.* 9 (1977), pp. 79–80, 135–136; 10 (1978), pp. 125–126.
3. Cf. *Comm.* 9 (1977), p 80.
4. Cf. *Comm.* 10 (1978), p. 126.
5. Cf., e.g., A. BERNÁRDEZ CANTÓN, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), p. 57.

1076 **Consuetudo novum impedimentum inducens aut impedimentis exsistentibus contraria reprobatur.**

A custom which introduces a new impediment, or is contrary to existing impediments, is reprobated.

SOURCES: c. 1041

CROSS REFERENCES: cc. 23–28, 1058, 1073–1075, 1077–1094

COMMENTARY

Juan Fornés

This legal precept literally reproduces c. 1041 of *CIC*/1917.

It is not necessary to include here everything pertaining to the Code's regulation of custom (see cc. 23–28 and commentaries thereon). It suffices to remember that one of the elements of the precept is reasonableness.[1] Canon 24 § 2 expressly indicates that custom cannot have the force of law *contra aut praeter ius canonicum* unless it is reasonable, and any custom expressly reprobated in the law is not reasonable.

1. Cf. on this point J. FORNÉS, "La costumbre 'contra legem', hoy," in *La norma en el Derecho canónico*, I (Pamplona 1979), pp. 747–781, with the doctrinal and bibliographical references contained therein.

1077 **§ 1. Ordinarius loci propriis subditis ubique commorantibus et omnibus in proprio territorio actu degentibus vetare potest matrimonium in casu peculiari, sed ad tempus tantum, gravi de causa eaque perdurante.**

§ 2. Vetito clausulam dirimentem una suprema Ecclesiae auctoritas addere potest.

§ 1. The local Ordinary can in a specific case forbid a marriage of his own subjects, wherever they are residing, or of any person actually present in his territory; he can do this only for a time, for a grave reason and while that reason persists.

§ 2. Only the supreme authority in the Church can attach an invalidating clause to a prohibition.

SOURCES: § 1: c. 1039 § 1; SCHO Resp., 14 feb. 1962
§ 2: c. 1039 § 2

CROSS REFERENCES: cc. 100–102, 105–107, 1058, 1071, 1073–1076, 1078–1094

COMMENTARY

Juan Fornés

This canon refers to the question of whether or not local Ordinaries have any power to establish impediments, and the conclusion is negative. Thus what this legal precept regulates is the logical consequence first, of the prescription in c. 1075 and ultimately, of the fundamental right of every member of the faithful (*ius connubii*, c. 1058) to enter into marriage. This canon substantially includes the content of c. 1039 of *CIC*/1917, especially the express indication in § 2.

Therefore, any prohibition by a local ordinary must fall within the specifically established limitations. These are the following: *a)* It must be a specific marriage (*matrimonium in casu peculiari*). *b)* The parties must be subject to the local ordinary, regardless of where they reside, or they can be any other persons who are in fact present in his territory. *c)* There must exist a grave cause. *d)* The prohibition can only be *ad tempus*, while the reason persists. This last clause means that it is not necessary to establish a *time limit*; the prohibition may be for an *indefinite*

time, that is, as long as the reason persists. It cannot, however, be a *perpetual* prohibition.[1]

As designed by the legislator, the prohibition falls into the area of lawful/unlawful, not valid/invalid marriages. Under § 2 a possible diriment clause could be added to the *vetitum* of the local ordinary only by the Supreme Authority of the Church and, in addition, as previously mentioned, it would have to be in accordance with the express general stipulations in c. 1075 § 2.

1. Cf. L. MIGUÉLEZ, "El matrimonio," in *Comentarios al Código de Derecho canónico*, vol. II (Madrid 1963), p. 490. See also S. GHERRO, "Natura, contenuto e limiti del diritto a celebrare il matrimonio stabilito dall'Ordinario ex can. 1077," in *Gli impedimenti al matrimonio canonico* (Vatican City 1989), pp. 41–52.

1078 **§ 1. Ordinarius loci proprios subditos ubique commorantes et omnes in proprio territorio actu degentes ab omnibus impedimentis iuris ecclesiastici dispensare potest, exceptis iis, quorum dispensatio Sedi Apostolicae reservatur.**

§ 2. Impedimenta quorum dispensatio Sedi Apostolicae reservatur sunt:
1° impedimentum ortum ex sacris ordinibus aut ex voto publico perpetuo castitatis in instituto religioso iuris pontificii;
2° impedimentum criminis de quo in can. 1090.

§ 3. Numquam datur dispensatio ab impedimento consanguinitatis in linea recta aut in secundo gradu lineae collateralis.

§ 1. The local Ordinary can dispense his own subjects wherever they are residing, and all who are actually present in his territory, from all impediments of ecclesiastical Law, except for those whose dispensation is reserved to the Apostolic See.

§ 2. The impediments whose dispensation is reserved to the Apostolic See are:
1° the impediment arising from sacred orders or from a public perpetual vow of chastity in a religious institute of pontifical right;
2° the impediment of crime mentioned in Can. 1090.

§ 3. A dispensation is never given from the impediment of consanguinity in the direct line or in the second degree of the collateral line.

SOURCES: § 1: c. 1040; SCDS Instr. *Sat frequentes*, 1 aug. 1931 (*AAS* 23 [1931] 413–415); *PM* I, 19, 20; *CD* 8b; *EM* IX
§ 2: *EM* IX, 12, 13
§ 3: c. 1076 § 3

CROSS REFERENCES: cc. 85–93, 108–109, 589, 599, 607–709, 1009 § 1, 1058, 1073–1077, 1079–1094

COMMENTARY

Juan Fornés

1. *Introduction*

First of all, let us point out that the general presentation of dispensations underwent important changes resulting from post-Vatican II

legislation. Specifically, this canon reflects a marked change in the matter of the local Ordinaries' faculty as it had been regulated in the prior Code. The corresponding norm in *CIC*/1917 (c. 1040) had already been affected by the provisions of the mp *De Episcoporum muneribus*,[1] which, in accordance with Decr. *Christus Dominus* from Vatican II, had modified the general system of dispensations.

According to c. 81 of *CIC*/1917, "Ordinaries under the Roman Pontiff may not dispense from the general laws of the Church, not even in a particular case, unless this faculty has been explicitly or implicitly given them, or unless recourse to the Holy See is difficult and there is also grave danger in delay; it must also concern a dispensation that the Apostolic See usually grants."

CD 8b, however, establishes that "in a particular case each diocesan bishop has the faculty to dispense the faithful who are subject to him by law from the general laws of the Church as often as he judges it suitable for their spiritual good, unless the supreme authority of the Church has made a special reservation."

The substance of Vatican II's regulation, which is the opposite of the system in *CIC*/1917, has been included in c. 87 § 1 (see commentary). Relative to this matter, the cases reserved to the Holy See have been specified in *De Episcoporum muneribus* IX, 11–16, which also expressly derogated from c. 81 *CIC*/1917 (cf. *EM* II).[2]

2. *Dispensation from impediments in normal circumstances*

In accordance with the overall viewpoint, the reform Commission initially proposed that the following impediments be reserved to the Holy See: *a)* age, when over one year; *b)* sacred order and perpetual profession in an institute of consecrated life; *c)* crime; *d)* consanguinity to the third degree of the collateral line, with the added caution that there is no dispensation from the impediment of consanguinity in the direct line; *e)* affinity in the direct line. Note that the degrees of consanguinity and affinity are calculated according to the Roman system (cf. cc 108–109), which replaces the Germanic system of *CIC*/1917 (cc. 96–97).

However, after the consultors had studied the suggestions from the different consultative bodies,[3] the number of cases reserved to the Holy See was reduced to the three listed in this canon: *a)* sacred orders, which

1. *AAS* 58 (1966), pp. 467–472.
2. Cf., however, the opinion of M. CABREROS DE ANTA, *Derecho canónico postconciliar* (Madrid 1969), pp. 80–81, which understood c. 81 (*CIC*/1917) as applicable under certain suppositions, even after *EM*, a position which, in the essentials, has been included in c. 87 §2.
3. Cf. *Comm.* 9 (1977), pp. 345–347.

obviously also includes the diaconate[4]; *b)* public vow of chastity in a religious institute of pontifical right; *c)* crime.

In the case of a vow, the 1980 *Schema* stated, "institute of consecrated life of pontifical right."[5] However, in the 1981 *Relatio* it was replaced by the expression "in a religious institute" to underline that the impediment affected only those who have made public vows, that is, religious, but not members of a secular institute[6] (obviously, members of societies of apostolic life are excluded).

Finally, regarding consanguinity, the clause in § 3 has been added. Initially this clause fell among the impediments of dispensation reserved to the Apostolic See, phrased as follows: "the impediment of consanguinity to the third degree of the collateral line, keeping in mind that there is no dispensation from the impediment of consanguinity in the direct line."[7]

The study group of the revision Commission on marriage law, however, examined several objections that had been made about the caution regarding the impediment of consanguinity of the direct line. Some members proposed that the caution be eliminated since the caution was included in § 4 of the canon regulating the impediment of consanguinity (in the present Code, c. 1091 § 4). Others said that the caution should be moved to a different place and this paragraph should refer only to the list of cases reserved to the Holy See.

After discussion the consultors reached the conclusion that the first caution was not sufficient. They deemed the second objection, however, to be timely. Thus it was decided to add another paragraph, the third, which is the text in the present Code.[8]

In addition, a vote was taken on whether to reserve the dispensation from the impediment of consanguinity to the third degree of the collateral line to the Holy See.[9] As pointed out above, the conclusion was negative.

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4. Cf. ibid., p. 346.
5. *Schema Codicis Iuris Canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum* (Libreria Editrice Vaticana 1980), c. 1031 §2.
6. Cf. *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis polyglottis Vaticanis 1981), p. 250. Cf. also p. 253, in which reference is made to c. 1041 of the 1980 *Schema* regarding the impediment to voting.
7. Cf. *Comm.* 9 (1977), pp. 345–346.
8. Cf. ibid., p. 347.
9. Cf. ibid.

1079 **§ 1. Urgente mortis periculo, loci Ordinarius potest tum super forma in matrimonii celebratione servanda, tum super omnibus et singulis impedimentis iuris ecclesiastici sive publicis sive occultis, dispensare proprios subditos ubique commorantes et omnes in proprio territorio actu degentes, excepto impedimento orto ex sacro ordine presbyteratus.**

§ 2. In eisdem rerum adiunctis, de quibus in § 1, sed solum pro casibus in quibus ne loci quidem Ordinarius adiri possit, eadem dispensandi potestate pollet tum parochus, tum minister sacer rite delegatus, tum sacerdos vel diaconus qui matrimonio, ad normam can. 1116 § 2, assistit.

§ 3. In periculo mortis confessarius gaudet potestate dispensandi ab impedimentis occultis pro foro interno sive intra sive extra actum sacramentalis confessionis.

§ 4. In casu de quo in § 2, loci Ordinarius censetur adiri non posse, si tantum per telegraphum vel telephonum id fieri possit.

§ 1. When danger of death threatens, the local Ordinary can dispense his own subjects, wherever they are residing, and all who are actually present in his territory, both from the form to be observed in the celebration of marriage, and from each and every impediment of ecclesiastical law, whether public or occult, with the exception of the impediment arising from the sacred order of priesthood.

§ 2. In the same circumstances mentioned in § 1, but only for cases in which not even the local Ordinary can be approached, the same faculty of dispensation is possessed by the parish priest, by a properly delegated sacred minister, and by the priest or deacon who assists at the marriage in accordance with Can. 1116 § 2.

§ 3. In danger of death, the confessor has the power to dispense from occult impediments for the internal forum, whether within the act of sacramental confession or outside it.

§ 4. In the case mentioned in § 2, the local Ordinary is considered unable to be approached if he can be reached only by telegram or by telephone.

SOURCES: § 1: c. 1043; *PM* 20, 21
§ 2: c. 1044; *LG* 29; *SDO* V, 22, 4; PCIDSVC Resp. 26 mar. 1968 (*AAS* 60 [1968] 363); Secr. St. Resp., 21 mai 1968; PCIDSVC Resp., 4 apr. 1969 (*AAS* 61 [1969] 348)
§ 4: CodCom Resp., V, 12 nov. 1922

CROSS REFERENCES: cc. 85–93, 100–107, 291, 1058, 1073–1078, 1080–1094, 1108–1123

COMMENTARY

Juan Fornés

This canon regulates dispensation when there is danger of death. Together with the case covered in the next canon (known as *casus perplexus*), it is a special situation in the system of dispensation from impediments. It establishes greater logical faculties for granting dispensations.

The particular interest of this material perhaps lies in the following summarized points:

a) The ordinary's power to dispense in this case includes, in addition to the substance of juridical form (cf. cc. 1108ff), all impediments in human law except the sacred order of priesthood (cf. also cc. 87 § 2 and 291). In this case *CIC*/1917 excluded the possibility of dispensation from the impediments of sacred order of the priesthood and of affinity in the direct line with consummation of marriage (cf. c. 1043 *CIC*/1917). In today's Code, suggestions to retain the exception of sacred order[1] were accepted by the legislator.

b) The old Code (cf. c. 1043 *CIC*/1917) required the conditions of not only danger of death, but also peace of conscience or legitimation of the offspring or both at the same time. The corresponding clause (*ad consulendum conscientiae et, si casus ferat, legitimationi prolis*) was included in the first draft of the precept,[2] but was eliminated in the final text. The same thing happened to another clause, which affected only the lawfulness of the dispensation and concerned the need to avoid scandal (*remoto scandalo*).[3]

c) Based on the provisions of c. 1044 *CIC*/1917 (a parish priest's faculty to dispense and an assisting priest's when, for lawfulness, he assists at a marriage in extraordinary juridical form), § 2 of the present canon

1. Cf. *Comm.* 9 (1977), p. 348.
2. Cf. ibid., p. 347.
3. Cf. ibid., p. 348.

states that in the same circumstances an appropriately delegated sacred minister may also dispense (cf. cc. 1108 and cross references). In addition to priests, deacons may also dispense when they assist at a marriage in a similar situation to the one covered in *CIC*/1917 (assistance for lawfulness in the extraordinary form, cf. c. 1116 § 2), according to *SDO* 22, 4.

d) To these must be added confessors (c. 1044 *CIC*/1917 did the same). Initially it was proposed to replace the text of the old Code (the confessor could dispense "only in the act of sacramental confession and for the internal forum"), with the following expression: "for the internal forum, but outside the act of sacramental confession."[4] After discussion by the Consultors on this matter in the preparatory work on the Code, debating on the difficult questions of the relations between the internal and external forum in the framework of the specific nature of the power of governance, and taking into consideration a *suggestio* from the Penitentiary[5] § 3 of this canon broadens the confessor's faculties with respect to the 1917 Code. The new text reads that he may dispense "whether within the act of sacramental confession or outside it." It is true that a confessor should dispense "in the internal forum" and furthermore, the impediments should be "occult," a specification that did not appear in c. 1044 of *CIC*/1917. Yet it seems that this is one of the cases in which the term "occult" does not have the technical meaning it has in c. 1074, but the common meaning; that there is no spreading of the information nor divulgation of the fact, nor is there proximate danger that this might happen. This is demonstrated, for example, by the early drafts of the precept in which the expression was not "occult impediments," but "occult case," (*si agatur de casu occulto*).[6] Moreover, it seems reasonable to give this interpretation in the circumstances where this possibility of dispensation is applicable.

e) In § 4 there is a specification pertaining to the possibility or not of approaching the local ordinary. Its precedent is in a Response from the CPI of November 12, 1922,[7] which essentially contained the provisions of the new § 4.

f) Finally, with regard to the obligation to advise the local ordinary of the dispensation granted for the external forum and record it in the marriage book, the prescription of c. 1081 must be taken into account. And with regard to recording a dispensation granted in the non-sacramental internal forum and its possible effect in the external forum, the criteria established in c. 1082 must be followed.

4. Cf. *Comm.* 9 (1977), p. 348.
5. Cf. ibid., pp. 349–350.
6. Cf. ibid., pp. 348 and 350.
7. Cf. *AAS* 14 (1922), pp. 662–663.

1080 **§ 1. Quoties impedimentum detegatur cum iam omnia sunt parata ad nuptias, nec matrimonium sine probabili gravis mali periculo differri possit Canon usquedum a competenti auctoritate dispensatio obtineatur, potestate gaudent dispensandi ab omnibus impedimentis, iis exceptis de quibus in can. 1078 § 2, n. 1, loci Ordinarius et, dummodo casus sit occultus, omnes de quibus in can. 1079 §§ 2–3, servatis condicionibus ibidem praescriptis.**

§ 2. Haec potestas valet etiam ad matrimonium convalidandum, si idem periculum sit in mora nec tempus suppetat recurrendi ad Sedem Apostolicum vel ad loci Ordinarium, quod attinet ad impedimenta a quibus dispensare valet.

§ 1. Whenever an impediment is discovered after everything has already been prepared for the wedding and the marriage cannot without probable danger of grave harm be postponed until a dispensation is obtained from the competent authority, the power to dispense from all impediments, except those mentioned in Can. 1078 § 2 n. 1, is possessed by the local Ordinary and, provided the case is occult, by all those mentioned in Can. 1079 §§ 2–3, the conditions prescribed therein having been observed.

§ 2. This power applies also to the validation of a marriage when there is the same danger in delay and there is no time to have recourse to the Apostolic See or, in the case of impediments from which he can dispense, to the local Ordinary.

SOURCES: § 1: c. 1045 §§ 1 and 3; CodCom Resp. IV, 1 mar. 1921 (*AAS* 13 [1921] 178); CodCom Resp. III, 28 dec. 1927 (*AAS* 20 [1928] 61); CodCom Resp. I, 27 jul. 1942 (*AAS* 34 [1942] 241)
§ 2: c. 1045 § 2; SCDF Resp., 18 dec. 1968

CROSS REFERENCES: cc. 85–93, 1066–1072, 1073–1079, 1081–1094, 1156–1165

COMMENTARY

Juan Fornés

1. What doctrine traditionally has called *casus perplexus* is regulated in § 1. It was covered in c. 1045 of *CIC*/1917.

It is important to note that here not only the impediment of order is excluded from the possibility of dispensation, but also the impediment of public perpetual vow of chastity in a religious institute of pontifical right. Substantial juridical form, not mentioned in this canon, should also be added to these, in contrast to c. 1079 § 1. No reference was made to it in the codical discipline of 1917, either. Although there were diverging doctrinal opinions,[1] the possibility of dispensation in this case was considered to be out of the question because, strictly speaking, "absence of canonical form" is not an impediment of the parties, rather it is a defect of the celebration.[2]

In addition, the three questions that could be raised concerning interpretation of this legal precept have already been satisfactorily resolved by previous doctrine and practice.[3] Specifically:

a) The impediment must be understood to be "discovered" when the parish priest or the ordinary learns of it, even if other persons previously knew about it.[4]

b) It is understood that "everything is prepared for the nuptials," as the canon states it, when all the preliminary canonical formalities have been completed as specifically regulated by the Bishops' Conferences (cf. c. 1067). In comparison to *CIC*/1917, the present Code has greatly simplified regulations on preparatory measures (investigation of the state of freedom of the parties and publication of marriage or banns, basically). *CIC*/1917 included a detailed regulation in cc. 1019–1034. The Instructions from the SCDS of July 4, 1921[5] and of June 29, 1941[6] must also be kept in mind. On the other hand, c. 1067, as previously noted, remits regulation of the matter to the Bishops' Conferences.

c) An "occult case" (see commentary on c. 1074) should be understood as an impediment that is not de facto divulged.[7]

2. The second paragraph refers to the validation of a marriage under these circumstances. It includes the provisions established in the old Code (c. 1045 § 2 *CIC*/1917), although the reference to the impediments from which an ordinary may dispense has been added to be consistent with the rest of the new system.

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1. E.g., G. ARENDT, "Dispensatio a forma matrimonii in casu perplexo," in *Periodica*, 16 (1927), pp. 1ff; J. BANK, *Connubia canonica* (Rome 1959), p. 299.
2. Cf., e.g., F.M. CAPPELLO, *Tractatus canonico-moralis de sacramentis*, V. *De matrimonio*, 6th ed. (Turin-Rome 1950), no. 234–bis; I. CHELODI-P. CIPROTTI, *Ius canonicum de matrimonio*, 5th ed. (Vicenza 1947), no. 41; J.M. MANS, *Derecho matrimonial canónico*, I (Barcelona 1959), p. 101; A. BERNÁRDEZ CANTÓN, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), p. 60.
3. Cf., e.g., J.M. MANS, *Derecho matrimonial...*, op. cit., pp. 101–102; L. MIGUÉLEZ, *El matrimonio*, in *Comentarios al Código de Derecho canónico*, II (Madrid 1963), pp. 409–501.
4. Cf. Reply of the CPI, March 1, 1921, in *AAS* 13 (1921), p.178.
5. *AAS* 13 (1921), pp. 348–349.
6. *AAS* 33 (1941), pp. 297–318.
7. Cf. Reply of the CPI, December 28, 1927, in *AAS* 20 (1928), p. 61.

1081 **Parochus aut sacerdos vel diaconus, de quibus in can. 1079 § 2, de concessa dispensatione pro foro externo Ordinarium loci statim certiorem faciat; eaque adnotetur in libro matrimoniorum.**

The parish priest or the priest or deacon mentioned in Can. 1079 § 2, is to inform the local Ordinary immediately of a dispensation granted for the external forum, and this dispensation is to be recorded in the marriage register.

SOURCES: c. 1946; *LG* 29; *SDO* V, 22, 4; PCIDSVC Resp., 26 mar. 1968 (*AAS* 60 [1968] 363); Secr. St. Resp., 21 may 1968; PCIDSVC Resp., 4 apr. 1969 (*AAS* 61 [1969] 348)

1082 **Nisi aliud ferat Paenitentiariae rescriptum, dispensatio in foro interno non sacramentali concessa super impedimento occulto, adnotetur in libro, qui in secreto curiae archivo asservandus est, nec alia dispensatio pro foro externo est necessaria, si postea occultum impedimentum publicum evaserit.**

Unless a rescript of the Penitentiary provides otherwise, a dispensation from an occult impediment granted in the internal non-sacramental forum, is to be recorded in the book to be kept in the secret archive of the curia. No other dispensation for the external forum is necessary if at a later stage the occult impediment becomes public.

SOURCES: c. 1047

CROSS REFERENCES: cc. 85–93, 489–490, 1073–1080, 1083–1094, 1121

COMMENTARY

Juan Fornés

These two canons regulate communication with the authority of jurisdiction and, when applicable, the later annotation that is then recorded

in the case of c. 1079 § 2 (dispensations granted for the external forum under the circumstances described therein; see c. 1079 and commentary). They also regulate dispensations from an occult impediment granted in the internal non-sacramental forum.

For the first case, regulated in c. 1046 *CIC*/1917, deacons are of course added (see commentary on c. 1079).

In the second case, the regulation in c. 1047 of *CIC*/1917 is also repeated. A dispensation from an occult impediment granted in the internal non-sacramental forum, unless a re-script of the Penitentiary indicates otherwise, is recorded in the book kept in the secret archive of the diocesan curia, described in cc. 489–490.

For the meaning of the term "occult" in these cases, see commentaries on cc. 1074, 1079 and 1080.

CAPUT III
De impedimentis dirimentibus in specie

CHAPTER III
Individual Diriment Impediments

1083 **§ 1. Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium valide inire non possunt.**

§ 2. Integrum est Episcoporum conferentiae aetatem superiorem ad licitam matrimonii celebrationem statuere.

§ 1. A man cannot validly enter marriage before the completion of his sixteenth year of age, nor a woman before the completion of her fourteenth year.

§ 2. The Bishops' Conference may establish a higher age for the lawful celebration of marriage.

SOURCES: § 1: c. 1067 § 1

CROSS REFERENCES: cc. 11, 203 § 2, 1059, 1066, 1071 § 1,2° and 6°, 1072, 1073, 1078 § 1, 1095 § 2, 1096 § 2

COMMENTARY

Juan Ignacio Bañares

1. In § 1 the minimum age is established for entering into a valid marriage. The age is the same as the age determined in *CIC*/1917.[1] In the former law the minimum was governed by the normal age of puberty,

1. Cf. P. GASPARRI, *Tractatus canonicus de matrimonio (editio nova ad mentem Codicis I.C.)*, I (Rome 1932), nos. 489–501.

twelve years for a woman and fourteen for a man.[2] Nevertheless, the minimum age indicated was not taken to be an absolute, but rather an assumption. Thus there could be exceptions under the classic clause, which was added to the established age: "nisi malitia suppleat aetatem," meaning, unless the typical traits, including mental, of the age of nubility, indicated by puberty, naturally developed early.

First, it seems clear that the basis for indicating a minimum age is anchored in nature. Second, however, it is also clear that the specification of age falls within the area of positive law; it depends upon the legislator's prudent criterion. Hence there may be dispensation. In addition, the legislator may not arbitrarily raise the minimum age required for validity, since one of the fundamental human rights and rights of the faithful is at risk: *ius connubii*.[3] This is the same *ius connubii* that prevents the legislator from establishing a higher age for entering marriage. What nature grants may be affected by time, but not totally eliminated in that it is a source of perfection of the total human being through marriageability.

In addition to these points of reference, at various times doctrine has emphasized one or another of the elements found in this natural foundation. First, some writers have pointed out the need for "potentia coeundi" to enter marriage. It has been objected, however, that "potentia actualis coeundi" is not part of the substance of marriage and therefore is not strictly necessary at the time of the marriage contract. This is basically because in the young, impotency will naturally disappear with time and because a person of the minimum age to marry may do so validly even though at the time of the marriage natural potency has not yet developed. The appropriateness of marriage in these circumstances is another matter, as are the moral problems that might result from such a situation.

In the second place, in this impediment the relation between aptitude for marriage and the discretion of judgment has been frequently emphasized. All things considered, we must point out that discretion of judgment today belongs to a different chapter of nullity; it refers to consent,[4] not to capability or aptitude to enter marriage, which is typical of impediments, it acts regardless of the age of a party. In addition, for impediments to have *objective* effect, discretion of judgment would not be sufficient to enter into marriage if the parties had not reached the required age. However, it is possible that the specification of age by the legislator indicates a *iuris tantum* assumption of the minimum age for discretion of judgment, considering the sociological criterion. But in any case, it

2. Cf. A. BALLERINI-D. PALMIERI, *Opus theologicum morale*, VI (Prati 1892), nos. 1157–1161; pp. 591, 594; P.A. D'AVACK, "Il 'defectus aetatis' nelle fonti e nella dottrina matrimoniale classica della Chiesa," in *Studi giuridici in memoria F. Vassalli*, I (Turin 1960), pp. 367–393; E. TEJERO, "La discreción de juicio para consentir en matrimonio," in *Ius Canonicum* 22 (1982), pp. 403–534.

3. Cf. *Comm.* 9 (1977), p. 360.

4. Cf. *Comm.* 9 (1977), p. 360.

appears to refer to a *peculiar* discretion of judgment, linked per se to the natural and biological process of development of a human being as a man or as a woman. The basis is perhaps more in puberty itself and the knowledge that nature brings during this stage of human growth, as pointed out in c. 1096 § 2.

Thirdly, it is also possible that, in part, this impediment has its own basis, giving it a certain autonomy with respect to the other impediments we have indicated. Perhaps this impediment includes not merely the capability of giving a naturally sufficient consent, but also the appropriateness of a spousal *relationship* between infants or children.[5] Marrying means giving oneself and receiving the other as a spouse, establishing a binding relationship as a permanent juridical condition for the whole person (a relationship that includes moral, educational, social, financial and other responsibilities). That is why, going even beyond discretion of judgment, a *child bride* and *child groom* appear to be seriously inappropriate from various points of view.

The assumptions in the question would be the following: *a)* There is an age at which nature ordinarily gives and drives human beings to adequate and sufficient knowledge and judgment for marriage; that would be the minimum substrate necessary for exercising the *ius connubii. b)* It appears that the beginning of the age of nubility is at puberty, at which time the characteristics of the sexual stage are successively unfolded. *c)* A person's development should be advanced enough not only to understand the scope of the commitment being made, but also to be capable of *living* as a spouse and potential parent. *d)* Given the possible variables involved in this stage, depending upon historical and cultural circumstances and the individual, the only feasible criterion for presuming the required capability, in law, is to specify the number of years from birth. The way to adapt to the many possible situations can be through the possibility of dispensation, or an increase in the minimum age (for lawfulness).

Thus *puberty* could be the natural criterion for distinguishing the beginning of the age of nubility. *Age*, as an impediment, would be a means of protecting the institution of marriage and the *ius connubii* of minors adequately for the legitimate demands of custom and civil laws. *Discretion of judgment* would be resolved in one of the elements that make up the normal maturity of puberty. And *appropriateness* of the parties (depending upon their development) for a spousal relationship, for *being spouses*, would be the *formal perspective* from which the impediment would contemplate the facts of the question.[6]

5. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III, *Derecho matrimonial, 1* (Pamplona 1973), pp. 336–341.
6. Cf. J.I. BAÑARES, "Edad y discreción de juicio en el matrimonio entre impúberes: una Respuesta del Doctor Navarro," in *Estudios sobre el Doctor Navarro. En el IV Centenario de la muerte de Martín de Azpilcueta* (Pamplona 1988), p. 290.

In addition, age should be calculated in accordance with c. 203. An age is not reached until the end of the day of the month on which the party was born.

2. According to § 2 of this canon, Bishops' Conferences are empowered to increase the minimum age with respect to the *lawfulness* of marriage. We have referred above to the play between the development of nature, the subjects' freedom, and the role of society. We have also considered the great variety of cases that could arise depending upon the circumstances of time, place and social customs in each culture. Therefore, we should now consider that in certain environments the established minimum age might regularly be insufficient to initiate a viable and normal conjugal relationship. In addition, many civil laws have raised the minimum age for marriage above the age established by canon law, with the consequent difficulty in obtaining civil recognition of a marriage contracted in the Church and the effects of the marriage. The *CCEO* (c. 800), which reproduces § 1 of this canon with no basic variations, in § 2 remits any increase in the age of the parties to the particular law of the Catholic concept of "sui iuris," for lawfulness.

For these reasons and with great sensitivity to the *salus animarum*, the Code itself exhorts pastors to dissuade "young people from entering marriage before the age customarily accepted in the region" (c. 1072). It prohibits pastors without permission from the local ordinary from assisting at a marriage that "cannot be recognised by the civil law" (c. 1071 § 1, 2°), and also at a marriage of a minor, if the parents are either unaware of it or are reasonably opposed to it (cf. c. 1071 § 1, 6°). Thus it can be seen that in certain regions, it may be a good idea to unify the criteria in the two systems.

There is always, however, a possibility of obtaining permission from the local ordinary, even the possibility of a dispensation from the canonical minimum age, that is sufficient to protect *ius connubii*, if necessary. In this way, a universal minimum age established with respect to validity, to safeguard juridical security, is combined with a variety of particular norms concerning lawfulness. These varied norms facilitate linking the canonical norm and pastoral prudence to the social context in which they should be applied and to the various civil norms.

Finally, with respect to dispensation, the following should be noted:

a) Although in *De Episcoporum muneribus* IX, 11, the reservation to the Holy See when the age of one of the parties was lower than the norm by more than one year was retained, in the present discipline this reservation has been eliminated. *b)* A dispensation could not be granted if the minimum capability required by nature was not present. *c)* In the final analysis, a dispensation requires a just and proportionate rationale (depending also upon the time needed by the parties to reach the established minimum age). *d)* It appears consistent to say that the Church could not

grant a dispensation to a party of an age lower than the age established by the civil law system if the party was not subject to canon law (for example, a non-baptized person, or a baptized person not formally within the Catholic Church). In such a case, the party should obtain a civil dispensation from the impediment for the marriage to be valid. *e)* In extreme cases[7] (for grave religious persecution) the Church has considered some marriages valid that were entered without dispensation because it was impossible or seriously inconvenient to request it, if the impediments were of the kind that the Church usually dispenses (among which is age).

7. Cf. SCHO, *Replies*, January 27, 1949 and December 22, 1949, in X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, vol. II (Rome 1969), nos. 2021 and 2093.

1084 § 1. **Impotentia coeundi antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive absoluta sive relativa, matrimonium ex ipsa eius natura dirimit.**

§ 2. **Si impedimentum impotentiae dubium sit, sive dubio iuris sive dubio facti, matrimonium non est impediendum nec, stante dubio, nullum declarandum.**

§ 3. **Sterilitas matrimonium nec prohibet nec dirimit, firmo praescripto can. 1098.**

§ 1. By reason of its very nature, marriage is invalidated by antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative.

§ 2. If the impediment of impotence is doubtful, whether the doubt be one of law or one of fact, the marriage is not to be prevented nor, while the doubt persists, is it to be declared null.

§ 3. Without prejudice to the provisions of Can. 1098, sterility neither forbids nor invalidates a marriage.

SOURCES: § 1: c. 1068 § 1; SCDF Decr., 13 may 1977 (*AAS* 69 [1977] 426)
§ 2: c. 1068 § 2; SCHO Resp., 16 feb. 1935; SCHO Resp., 28 sep. 1957; SCHO Resp., 28 jan. 1964; SCHO Resp., 25 mar. 1964
§ 3: c. 1068 § 3

CROSS REFERENCES: cc. 15 § 1, 1055 § 1, 1060, 1061 § 1, 1163 § 2, 1608 § 1, 1098

COMMENTARY

Juan Ignacio Bañares

1. Marriage *in facto esse* consists of a relational bond that assumes and implies that as part of the bargain, the parties are able to have intercourse with one another, referring to the aspect of masculinity and femininity that typifies human beings. As one of its purposes, this relationship has within it the possibility for man and woman to be a unique beginning of the procreation of new human lives (cf. cc. 1055 § 1, 1061 § 1); indeed, the procreative faculty tends in and of itself toward that end. For that reason each partner must specifically possess such a possibility in the conjugal relationship. Each giving oneself and receiving the other as spouse necessarily means giving oneself and receiving the other as a potential parent.

Perhaps that is why the term "impotentia coeundi" was again introduced into the text of the Code, making a distinction between it and what may be called "impotentia generandi." The first expression, used in § 1 of this canon, refers to the impossibility of the parties performing the acts proper to spouses and that are by their nature able to procreate new life. That is as far as a human being can go in conjugal donation. On the other hand, the fact that it may or may not be followed by the procreative effect is beyond the call of duty. The difference lies in the fact that marriage requires the possibility of actually performing the conjugal act, whereas the conjugal act in itself does not require that a new human being be necessarily produced. Marriage means giving and receiving the right and the duty to act as a potential procreator, but the right to effectively achieve procreation is not acquired. For that reason the Church has always understood that sterility ("impotentia generandi") per se does not nullify nor impede marriage, while she has considered herself as not having the power to grant a dispensation from the impediment of impotence. Further on we shall be more explicit about the expression *per se*, referring to sterility.

The *juridical content* of the concept of impotence should definitely be understood as "the inability to verify conjugal copulation"[1] or, in other words, as the impossibility of consummating the marriage. According to c. 1061 § 1, consummation occurs when the spouses "have, in a human manner, engaged together in a conjugal act in itself apt for the generation of offspring; to this act marriage is by its nature ordered and by it the spouses become one flesh." Consequently, anyone who cannot engage in the conjugal act "humano modo" would also be affected by this impediment, even if able to achieve apparent consummation by other means or in another manner. Finally, for practical purposes, the Decree of May 13, 1977 was issued to resolve ancient doctrinal disputes about the specific requirements of conjugal copulation. It clarified that "eiaculatio seminis in testiculis elaborati" is not necessarily required. Hence we can deduce that to perform copulation it is necessary and sufficient to penetrate and inseminate or ejaculate ("penetratio et effusio"), but the quality of the semen transmitted is irrelevant. Thus it suffices that the act of transmitting semen be performable "humano modo"; the implication is that a vasectomy per se does not imply impotence but only sterility.

2. The *essential elements* for impotence are derived from the content of the institution of marriage. Since marriage is a *relational* type of reality, it must inevitably consist of the subjects who constitute the two elements of the relationship. Since the subjects of a marriage are always concrete, it suffices that either of them be impotent (man or woman) for there to be an impediment. It also suffices that there be a de facto impossibility of conjugal copulation between *them* (even if they are capable of performing

1. Decr. of the SCDF, May 13, 1977, in *AAS* 69 (1977), p. 426; cf. J.P. SCHOUPPE, *Le droit canonique. Introduction générale et droit matrimonial* (Brussels 1991), no. 172, p. 154.

with other persons; this circumstance is termed *relative* impotence, and it acts as an impediment only for entering marriage with persons with whom it is not possible to perform the conjugal act).

3. *Temporally*, a distinction must be made between the beginning and the end of the impotence that causes the impediment. For the beginning of impotence, it must logically occur prior to the time of entering marriage. If at the time of marriage the party were in total possession of the ability to copulate, then what was given and received as the object of the marriage contract was complete and perfect and therefore the bond arises and cannot be dissolved by a later event. If impotence arose prior to entering the marriage, the marriage would be null and void, regardless of when it happened or what the cause. And if the origin occurred after entering marriage, the marriage would continue to be valid and indissoluble. One could, however, apply to the Roman Pontiff for a "super rato" dispensation if when impotence began the marriage had not yet been consummated. Impotence must, then, *precede* marriage.

With respect to the end of the time period, impotence must be *perpetual* in the juridical meaning of the word, that is, it cannot be healed by lawful and ordinary means (without danger of serious harm). In any case, if anyone were to be cured of perpetual impotence by whatever means, if that person had married prior to being cured, the marriage would have to be considered as null and void. After being cured, however, the person would be able to enter into marriage or, if applicable, apply for "sanatio in radice" (c. 1163 § 2). Temporary or curable impotence would not exclude the dimension of total giving and exchanging of each other between the parties when they become spouses.

4. With regard to the *certainty* of being able to recognize impotence § 2 of the canon indicates that when in doubt, *de facto* or *de jure*, it should be ignored. This means that if the doubt arises before marriage, it must not impede the celebration of marriage; if it arises after the celebration, the marriage must not be declared null and void (as long as the fact that doubt persists is understood). This last phrase was added by *CIc*. Although it may not be strictly necessary, for it could be considered to be implicit, having several reasonable foundations: *a)* Since the problem may arise in both cases, it is not superfluous to refer expressly to both. *b)* The principle is the same for both situations; the *present* condition at the time is defended (freedom to marry in the first case and the binding relationship in the second). *c)* The value being protected, *ius connubii*, is also identical in both cases, for *ius connubii* defended as *ius contrahendi* before the marriage, after the marriage should be defended as the projection of *ius manendi vinculi*, which usually translates juridically into *favor matrimonii* (c. 1060). *d)* The phrase is a specific embodiment of the general criterion established in c. 1608 §§ 1 and 4 on the moral certainty needed by the judge before handing down his decision in a case. *e)* There is also a practical

purpose, but important nevertheless, because the legislator expressed the intent to "achieve uniform jurisprudence in this matter."[2]

5. The irrelevance of whether impotence is known by the other party before marriage was expressly included in *CIC*/1917. We believe that the elimination of this expression changes nothing. The same paragraph expressly states that impotence makes a marriage null and void "ex ipsa eius natura." That sufficiently emphasizes that the reality of the situation cannot be changed by the subjective factor of whether it is known by the parties. Furthermore, the general principle of c. 15 § 1 establishes that "Ignorance or error concerning invalidating or incapacitating laws does not prevent the effect of those laws ..."

6. We have already mentioned that *sterility* per se neither prohibits nor nullifies marriage. In fact, in the work on the reform of *CIC*/1917 the consultors emphasized that "sterility is not an impediment to marriage 'ex ipso iure naturae,'"[3] It is, however, a good idea to refer now to the express remission of § 3 to c. 1098 (see commentary), which declares null and void the marriage of a person "who enters marriage inveigled by deceit perpetrated in order to secure consent concerning some quality of the other party which of its very nature can seriously disrupt the partnership of conjugal life." Without analyzing c. 1098 (expressly defined for the first time in *CIC*), we can see that the remission in and of itself emphasizes that sterility per se cannot be a cause for nullification. It also indicates that sterility is a possible example of one of the qualities included in c. 1098.[4] A different matter would be the need to prove that, *in casu*, deceitfully hiding this quality had or had not been a part of the effective manipulation of consent by the other party. What is clear, in any case, is that nullity could be the result of a defect of consent in the other party, and not an effect of the quality of the person who lacks it.[5]

The parallel canon in the *CCEO* (c. 801) is not different from this canon in any way.

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2. *Comm.* 9 (1977), p. 361.
3. Ibid.
4. Cf. *Comm.* 9 (1977), p. 362.
5. Cf. *Comm.* 7 (1975), pp. 59–60; cf. P.A. BONNET, *L'impedimento di impotenza (can. 1084 CIC)*, in *Gli impedimenti al matrimonio canonico. Scritti in memoria di Ermanno Graziani* (Vatican City 1989), pp. 112–113.

1085 **§ 1. Invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quamquam non consummati.**

§ 2. Quamvis prius matrimonium sit irritum aut solutum qualibet ex causa, non ideo licet aliud contrahere, antequam de prioris nullitate aut solutione legitime et certo constiterit.

§ 1. A person obliged by the bond of a previous marriage, even if not consummated, invalidly attempts marriage.

§ 2. Even though the previous marriage is invalid or for any reason dissolved, it is not thereby lawful to contract another marriage before the nullity or the dissolution of the previous one has been established lawfully and with certainty.

SOURCES: § *1*: c. *1069* § *1*
§ 2: c. 1069 § 2

CROSS REFERENCES: cc. 1055 § 1, 1056, 1057 § 1, 1060, 1061 § 3, 1071 § 2,2°, 1143 § 1, 1150, 1707

COMMENTARY

Juan Ignacio Bañares

1. The first paragraph of this canon contains certain implicit assumptions: *a)* It is understood that the essence of an *in facto esse* marriage lies in the bond; the marital alliance (cf. c. 1055 § 1) becomes the unique relationship established at the time of marriage *in fieri* as something required by law.[1] *b)* The bond takes effect at the time of giving consent (cf. c. 1057 § 1) and therefore does not depend upon consummation of the marriage. This clarification does not appear in c. 802 § 1 *CCEO* ("quamquam non consummati"), probably because c. 776 § 1 is considered to be sufficiently clear. *c)* The essential properties of a marriage (the requirements of unity and indissolubility, cf. c. 1056), originate at the time the bond is established. *d)* This impediment is directly based on the union, for reference is made to the impossibility of entering a second marriage while a previous bond exists. *e)* It is assumed that the previous bond was validly established. That would not be the case, for example, if a person obligated to follow canonical form had entered a "civil marriage," even though for a

1. Cf. T.P. DOYLE, commentary on c. 1085, in *The Code of Canon Law. A Text and Commentary* (New York 1985).

canonical marriage to be lawful, permission from the local ordinary must be sought (cf. c. 1071 § 1, 2°). *f)* For the impediment to arise, the previous bond must be permanent or currently in effect. *g)* In the final analysis, the objective reality of things determines the validity or nullity of a marriage. Thus a properly handed-down decision declaring a marriage null "contra rei veritatem" would not make the marriage null, in spite of appearances. Similarly, a decision of validity contrary to the truth would not make the marriage valid, even if in both cases the spouses not in error and ignorant of the fact were to act in good faith and consider themselves spouses or not because of the decision.

As for its *foundation*, this impediment is based on the nature of the institution of marriage in natural and divine law, repeatedly confirmed in Revelation.[2] This implies that no human authority may dispense from it. It also implies that the impediment affects non-baptized persons, with the exception, if we may call it that, to which we shall refer.

In *CIC*/1917 the words "salvo privilegio fidei" (c. 1069 § 1) are added. After various opinions from the consultors, they were finally eliminated from the definitive text of the Code.[3] The reasons for keeping them were based on the fact that in the "privilegium fidei," a first marriage is not dissolved until a second marriage is entered. (cf. c. 1143 § 1). The arguments for eliminating the words from this place in the Code stressed that a new marriage is valid only because of the *dispensation* from the Roman Pontiff, who *dissolves* a marriage bond that has been entered into outside the Church (even though the *moment* of dissolution is when a new marriage takes place). In any case, apart from discussions over the appropriateness of this elimination, nothing about the "privilegium fidei" is changed with respect to previous law.

With respect to *successive marriages*, theoretically "favor matrimonii" (cf. c. 1060) favors the validity of each marriage depending upon when it took place[4] (except in the specific case of Petrine privilege). Thus if the first bond were either dissolved or declared null and void, it would theoretically be so due to the validity of the second marriage. In other words, a later union could not take place without the second marriage being declared null, or without the bond having been dissolved.[5] Such a case could occur, for example, with a non-Catholic person, or a non-Christian, who had been married several times with the respective divorces, and who

2. Cf., e.g.: Gen 2, 24; Mt 19, 3ff; Mk 10, 2–12; Lk 16, 18; 1 Cor 7, 4, 10 and 39; Eph 5, 32; Rom 7, 3.

3. Cf. *Comm.* 9 (1977), p. 362; cf. J. FORNÉS, *Derecho Matrimonial Canónico* (Madrid 1990), pp. 66–67, note 44.

4. Cf. *Reply* of the CPI, June 26, 1947, in: *AAS* 39 (1947), p. 374.

5. Cf. T. DORAN, "L'impedimentum ligaminis (can. 1085 CIC)," in *Gli impedimenti al matrimonio canonico. Scritti in memoria di Ermanno Graziani* (Vatican City 1989), pp. 175–176, reproducing a Decree of the Signatura, June 18, 1987.

wished a canonical marriage with another person after joining the Catholic Church, or because the other party was Catholic.

2. The second paragraph of the canon, although literally take from c. 1069 § 2 *CIC*/1917, offers several points of special interest. Upon first reading, it seems simply that a disciplinary question is being regulated: the prohibition against remarrying, through dissolution of a bond, until certain legal and ascertaining requirements are met. We believe, however, that the content goes deeper; it goes beyond mere prescription of a chronologically ordered succession of acts subject to the juridical system. Basically, a question is being raised and resolved about the objective efficacy of "veritas rei" relative to the formal element of canon law and the subjective element of certainty.

We have already stated that "veritas rei" is always and definitively the ultimate, actually the only, basis for the nullity or validity of a marriage. This is because neither the positive force of law can vary it, make it not what it is, or make it what it is not, nor can the erroneous knowledge or will of the parties make it different from what it is. Indeed, subjective *certainty* about the nullity of a marriage or its dissolution is not sufficient to access another, subsequent marriage; the certainty that results from procedures established by the system is what is required. That is how the presumption of validity or permanence of the marriage bond is defended. Possible evils derived from precipitate acts are foreseeable. Perplexity and scandal that might arise from allowing a situation of fact different from the situation of law are avoided. Even the appearance of absolute divorce or bigamy is prevented. Any individualistic attitude is forestalled that places individual judgment before the juridical system; such an attitude would, however, be influenced by the development of the legitimate process that might take place to clarify the facts.

Furthermore, the formality of the law is not merely adjectival, but tends toward protecting important social goods, among others, *juridical security*. For that reason, since the question of marriage is so central to an individual and to society in general, not only is nullity required, or the effective elimination of the previous marriage bond, or that someone is convinced in good faith that that is so, but also that the fact is *legitimate*. The *certainty* that the marriage bond is null or dissolved, as referenced in the second paragraph of this canon, therefore, is that this is a fact *according to law*.

Consequently, if it appears certain that a spouse has died and if there is no reliable documentation of the death, a "declaration of presumed death" must be requested from the diocesan bishop. If after the appropriate investigation, never by simple passage of time, the diocesan bishop deems he has reached moral certainty about the death of the spouse, the corresponding declaration legally permits the surviving spouse to enter into a new marriage (cf. c. 1707). And the spouse may not lawfully enter into another marriage without that declaration.

With all of the above, it is obvious that objective truth continues to be the ruling factor. Therefore, in the case of procedures on validity, if anyone enters a new marriage *before* a previous marriage is declared null and void, the second marriage is *unlawful.* Its validity or nullity depends upon the objective validity of the first marriage as established by the corresponding authorized decisions. In the case of a declaration of presumed death, if in spite of due diligence and in spite of any certainty reached by the diocesan bishop, the spouse presumed to be dead should not have died, the marriage entered into by the other spouse with another individual would have been null. When the error was discovered, the marriage would have to be considered *putative* (cf. c. 1061 § 3).

1086 **§ 1. Matrimonium inter duas personas, quarum altera sit baptizata in Ecclesia catholica vel in eandem recepta nec actu formali ab ea defecerit, et altera non baptizata, invalidum est.**

§ 2. Ab hoc impedimento ne dispensetur, nisi impletis condicionibus de quibus in can. 1125 et 1126. § 3. Si pars tempore contracti matrimonii tamquam baptizata communiter habebatur aut eius baptismus erat dubius, praesumenda est, ad normam can. 1060, validitas matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam.

§ 3. Si pars tempore contracti matrimonii tamquam baptizata communiter habebatur aut eius baptismus erat dubius, praesumenda est, ad normam can. 1060, validitas matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam.

§ 1. A marriage is invalid when one of the two persons was baptised in the catholic Church or received into it and has not by a formal act defected from it, and the other was not baptised.

§ 2. This impediment is not to be dispensed unless the conditions mentioned in Cann. 1125 and 1126 have been fulfilled.

§ 3. If at the time the marriage was contracted one party was commonly understood to be baptised, or if his or her baptism was doubtful, the validity of the marriage is to be presumed in accordance with Can. 1060, until it is established with certainty that one party was baptised and the other was not.

SOURCES: § 1: c. 1070 § 1; SCPF Resp., 26 feb. 1924; *MM* 2
§ 2: c. 1071
§ 3: c. 1070 § 2

CROSS REFERENCES: cc. 11, 39, 845 § 2, 849, 864, 865, 869 §§ 1–2, 1059, 1060, 1063,4°, 1071, 1117, 1124–1129

COMMENTARY

Juan Ignacio Bañares

1. The matter of this canon specifically treats of the need for the parties to belong to the Church to be able to enter into a valid marriage. In

principle, as commonly known, "merely ecclesiastical laws bind those who were baptized in the Catholic Church or received into it ... " (c. 11). In addition, the very substance of marriage consists of a juridical *relationship* between two subjects; thus the Code specifies that "the marriage of Catholics, even if only one party is a Catholic, is governed not only by divine law but also by canon law ... " (c. 1059). Finally, a part is also played by the fundamental right to marry, as a person and as a member of the faithful, and the duty to protect the good of the faith and to teach it to the offspring.[1]

When *CIC*/1917 in c. 1060 prohibited marriage between a Catholic and a non-Catholic Christian, it added, "If there is danger of perverting the Catholic spouse or the offspring, divine law also prohibits marriage." And c. 1071 of *CIC*/1917 declared this criterion to be obviously applicable to a marriage between a Catholic and a non-baptized person with the impediment of disparity of cult. In the present text this expression does not appear, perhaps because in current circumstances, the principle of religious freedom and tolerance of other religious confessions or beliefs is more important and widespread. It is therefore easier to avoid risk for the Catholic party. But it is probably also due to the difficulty of estimating whether there is any danger of perversion. In any case, as a formulation of a doctrinal principle, it is clear that it continues on.

Perhaps that is why, in § 2 of the canon, the legislator has opted for a *positive* approach. The conditions indicated in cc. 1125 and 1126 (with remission to the Bishops' Conference of each area) are expressly required for a dispensation. Actually, these requirements are there to provide a minimum safeguard against the danger of perversion, and at the same time to respect the *ius connubii* as much as possible. The requirements are safeguarded because they are *conditions* for the marriage to be valid. In c. 39 the word "nisi" is one of the particles specifically used to introduce a condition that affects the validity of an act. In this case the definitive and unequivocal nature of the words used suggests that without those conditions, or without the true minimum meaning thereof, there could be no valid dispensation. Then the impediment would persist. Clearly the conditions are not "fulfilled," as the text of the Code reads, if they do not protect the specific good that the legislator is seeking with this invalidating norm. Behind the impediment there is a basis in divine law, the personal good of faith, which is supported by belonging to the Church. This good should be protected above all else, and the Church cannot *dispense* from this duty. For that reason, she opts to ensure the means to avoid the possible danger and gives the same treatment on this point to mixed marriages (cc. 1125–1126).

1. Cf. A.M. ABATE, *Il matrimonio nella nuova legislazione canonica* (Rome 1985), pp. 98–99; cf. P.J. VILADRICH, *Teoría de los derechos fundamentales del fiel. Presupuestos críticos* (Pamplona 1969), pp. 390–397.

When, however, marriage with a non-baptized persons does not gravely affect this irrevocable nucleus of faith, the impediment should be understood as a just precaution imposed by the Church, but by itself it is not more important than the *ius connubi.*[2] Thus, if there is just cause and no danger to faith, the right to enter into marriage is clearly the basis for granting a dispensation. Hence, for exceptional cases such as grave religious persecution, the Church has recognized the validity of marriages between Catholics and non-baptized persons in cases usually dispensed by the Church if "they could not obtain the due dispensation, either at all or without serious inconvenience, and if they could not cancel nor delay the marriage."[3] Furthermore, the truly exceptional nature of these cases and the conditions required even then, show the importance of the norm for other situations, even difficult ones, that could arise.

2. The first element of the impediment is that one of the parties must belong to the Catholic Church. Before *CIC*/1917, the Church included every baptized person in this impediment, whether or not Catholic. To avoid the nullity of marriages between a non-Catholic Christian and a non-baptized person, when *CIC*/1917 was written this impediment was reduced to covering a person baptized in the Catholic Church or converted to it "from heresy or schism" (c. 1070 § 1 *CIC*/1917). The prohibition and consequent need for a dispensation to enter into a valid marriage continued to apply, however, to persons who had belonged to the Church and later abandoned it.[4] This principle was consistent with the norm in c. 1099 § 1,1° *CIC*/1917, which required canonical form for "everyone baptized in the Catholic Church and everyone converted to the Church from heresy or schism, although both might have later abandoned their heresy or schism."

The current legislator decided to restrict the scope of this invalidating norm again so as not to nullify the marriage of persons who have left the Church. This it does by requiring a dispensation for the marriage to be valid. It can be assumed that the parties would not be in a position to request such dispensation. Thus, at the end of § 1, a new requirement has been added for the impediment to be effective: remaining in the Church, or negatively expressed, not separated from the Church "by a formal act." This is the same as the concept required in the present c. 1117 for the obligation to follow the canonical form of marriage. In answer to the question about what "formal act" means, the final determination will have to be made by jurisprudence, although it would not be *de trop*, it would even be

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2. Cf. J.I. BAÑARES, "El 'ius connubii,' ¿derecho fundamental del fiel?" in *Fidelium Iura* 3 (1993), pp. 250–251.

3. SCHO, *Replies*, January 27, 1949 and December 22, 1949, in X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, vol. II (Rome 1969), nos. 2021, 2093. Cf. F.M. CAPPELLO, *Tractatus canonico-moralis de Sacramentis*, vol. V: *De Matrimonio* (Rome 1950), nos. 199, 425.

4. Cf. CPI, *Reply*, April 29, 1940, in *AAS* 32 (1940), p. 212.

desirable, to have a clarification or reply from the PCILT on this matter. Canon 803 § 1 of the *CCEO* simply states, "Matrimonium cum non baptizatis valide celebrari non potest."

In any case, the following statements may be made: *a)* It cannot be the same as the mere fact of a life of disconformity with the Church's norms, or simple loss of faith, or an education different from Catholic doctrine.[5] This can be deduced from c. 1071 § 1,4°, which requires a witness who has received permission from the local ordinary to assist at the marriage "of a person who has notoriously rejected the catholic faith." *b)* It is not a type of behavior or the sum of specific acts, nor a critical attitude or position from the *personal* side; a formal act is required, which must be external and juridical and must *constitute* a new situation expressly desired and opposed to communion with the Catholic Church. An example would be a written statement addressed to ecclesiastical authorities, or, more frequently, the act of joining another religious confession (in that case, a statement by an immigrant made for the sole purpose of obtaining civil benefits in the new country would not be sufficient, for example.)[6]

For baptism and its validity, see cc. 849ff. For the validity of baptism in the various religious confessions for the effects of receiving their faithful into the Catholic Church, consult the *Directory For the Application of the Principles and Norms on Ecumenism.*[7] Children of persons validly baptized in another religion and later received into the Catholic Church are also considered converted to the Catholic Church if they received education in the Catholic faith from infancy, even if baptized in the other religion.[8]

3. *In § 3 a marriage is presumed valid if at the time of the marriage* "one party was commonly understood to be baptized, or if his or her baptism was doubtful." There was a suggestion made to eliminate this paragraph, but the legislator preferred to retain it, slightly improving the wording by replacing "standum est pro valore matrimonii" (c. 1070 § 2 *CIC/* 1917) with the expression "praesumenda est validitas matrimonii."[9] Thus, in the two cases covered in this paragraph of c. 1086, simple doubt about a hypothetical nullity or nonexistence of baptism of one of the parties is not sufficient to weaken the certainty of a marriage bond that was intended to be made according to law. These are not cases of the impediment not being applicable, but cases in which a presumption in favor of the validity of marriage is not removed except by certainty. Consequently, there can be no impediment as long as there is doubt. The obverse is that from a

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5. Cf. *Comm.* 8 (1976), pp. 54–56, 59–60, and 10 (1978), pp. 96–98.
6. Cf. F. BERSINI, *Il nuovo diritto canonico matrimoniale. Commento giuridico, teologico, pastorale*, 3rd ed. (Turin 1985), p. 73.
7. *AAS* 85 (1993), p. 1039; original document written in French.
8. Among those who hold this opinion are, e.g., R. SEBOTT–C. MARUCCI, *Il nuovo diritto matrimoniale della Chiesa* (Naples 1985), pp. 108–109.
9. Cf. *Comm.* 9 (1977), p. 363.

pastoral point of view, if any doubt about the validity of a baptism should arise before the marriage and should persist after investigation (cf. cc. 845 § 2, 869 § 1), an "ad cautelam" dispensation would be requested or, better yet, if there was no difficulty, a "sub condicione" baptism might be administered.

In relation to this matter, note that when one of the parties is validly baptized but in a different religion from the Catholic Church, and the party has not been received in the Church, this impediment is not applicable. This type of case falls under the consideration of "mixed marriages," which are regulated in cc. 1124–1129; because they are sacramental marriages, their prohibition affects the lawfulness but not the validity of the marriage. On the possibility of administering baptism conditionally in these cases, c. 869 § 2 requires "a serious reason" for doubt about its validity. All things considered, it must be realized that circumstances will vary a great deal from one place to another. For example, in some countries there are cases in which the birth of a newborn child is directly recorded in the Department of Vital Statistics with the official religion of the country unless otherwise announced, even if baptism is not indicated nor the parents' intention to actually baptize the child verified. In those cases, therefore, the birth certificate with religion indicated is not sufficient, it would be necessary to verify if baptism of the child so recorded actually took place.

Finally we may note the cautions prescribed in c. 1125: *a)* There are two requirements for a Catholic party: to take measures to avoid any danger to the party's faith and to make every attempt to baptize and educate all offspring in the Catholic Church. *b)* A non-Catholic party must be informed of the promises made by the Catholic party. *c)* Both parties are to be instructed about the natural properties of marriage (the object of their consent).

Clearly the role of pastors is especially important in this type of marriage, both before the marriage, especially to comply with the required precaution and after. For the role of the Bishops' Conferences and bishops regarding these marriages once entered into, see the appeal in *Familiaris consortio* 78. For pastoral care that should be given by the entire ecclesial community to parties who marry, note the duty indicated in c. 1063, 4°.

1087 **Invalide matrimonium attentant, qui in sacris ordinibus sunt constituti.**

Those who are in sacred orders invalidly attempt marriage.

SOURCES: c. 1072

CROSS REFERENCES: cc. 87 § 2, 194 § 1,3°, 277 § 1, 290–292, 976, 1008, 1009 § 1, 1025 § 1, 1026, 1031 § 2, 1037, 1041,3°, 1042,1°, 1044 § 1,3°, et § 2,1°, 1078 § 2,1°, 1079, 1394 § 1, 1712

COMMENTARY

Juan Ignacio Bañares

The prohibition in this canon is based on the current effect of the norm on celibacy for sacred ministers and on the legislator's express interest in protecting celibacy (cf. c. 277). The Church has maintained the importance of reserving access to sacred ministries to those who have received the charism of celibacy because of its great and venerable tradition, the positive meaning of historic experience, and for spiritual and practical reasons.[1] In addition to tradition there is the force of numerous magisterial documents that were especially frequent and solemn in the second half of the twentieth century. The proposal of critics and other alternatives gave rise to new attention, close and particularly in-depth, by Vatican Council II (cf. *LG* 29; *PO* 16; *OT* 10), by a Synod of Bishops,[2] and by Popes Paul VI[3] and John Paul II.[4]

From a juridical point of view, however, note that the invalidating nature of the norm does not come from the law on celibacy per se, but from this specific canon, in which the legislator so determines it. The law on celibacy *justifies* both the basis and the purpose of the invalidating nature of the canon, but it does not imply it nor constitute it.[5]

1. Cf. M. LÓPEZ ALARCÓN-R. NAVARRO-VALLS, *Curso de derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), p. 111.
2. Cf. III Synod of Bishops, *Documento sobre el Sacerdocio ministerial*, in *AAS* 62 (1971), pp. 915–918; cf. *PDV*, 29, 50.
3. Cf. PAUL VI, Enc. *Sacerdotalis caelibatus*, in *AAS* 59 (1967), pp. 657–697.
4. Cf. JOHN PAUL II, Letter *Novo incipiente (a todos los sacerdotes de la Iglesia)*, April 8, 1979, in *AAS* 71 (1979), pp. 393–417 (especially pp. 405–409).
5. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho Matrimonial Canónico*, 5th ed. (Madrid 1986), p. 85.

In the case of a person ordained "in sacris" there is a spiritual commitment with supernatural meaning that has been assumed under special circumstances of preparation and freedom. The commitment is so great that it influences the function of the member of the faithful in the Church and is characterized by a determining note of being both public and solemn. For that reason it is not that the right to enter into marriage is renounced "stricto sensu," that there can be no such right; rather we have here a free assumption of an incompatible juridical situation. Its consequence causes the effect of exercising it to be suspended; but *suspension* is different from *loss*, and *incompatibility* is different from *renunciation.*[6]

2. Up until the last revision and reform of the norms on sacred orders, orders were divided into major and minor. The presbyterate, diaconate and subdiaconate were major orders, and the acolyte, exorcist, lector and porter were minor orders (cf. c. 949 *CIC*/1917). Hence acceptance of the subdiaconate, even though it is not a sacred order of divine institution, requires celibacy and gives rise to the impediment of c. 1087 (cf. c. 1072 *CIC*/1917). With the *ex novo* regulation of this entire matter, since Vatican Council II (cf. *SDO* and *MQ*), there is no longer a subdiaconate; instead the so-called "lay ministries" were established for acolyte and lector. Sacred orders were reduced to the diaconate, presbyterate and episcopate (cf. c. 1009). Therefore, the act of creating *ministries* is not accomplished through *ordination*, but through *institution*. In addition, the episcopate has been expressly marked as a specific grade of the sacrament of order (cf. *LG* 25). It is established by *ordination* (previously the term used was episcopal *consecration*).

Thus this norm affects anyone who *accedes* to the current sacred orders: deacons, priests and bishops (cf. c. 1009 § 1). It also applies to sacred ministers who, being married and having acceded lawfully to their ministry, for any reason find their marriage bond dissolved or terminated. That would be the case, for example, of persons who acceded to a permanent diaconate while they were married (cf. *LG* 29; *SDO* 11; and c. 1031 § 2) or of certain sacred ministers validly ordained in another religion, received into the Catholic Church and admitted to practice their ministry. In those cases, they could not remarry, for this impediment would apply to them, since the legislator expressly wished to omit such an exception which appeared in one of the earlier *schemata* before the final text of the current Code.[7]

6. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*. III. *Derecho Matrimonial, 1* (Pamplona 1973), pp. 316–317; J.I. BAÑARES, "El 'ius connubii,' ¿derecho fundamental del fiel?" in *Fidelium Iura* 3 (1993), p. 251.

7. Cf. *Comm.* 9 (1977), pp. 364ff; cf. c. 804 *CCEO*. With respect to permanent diaconates, cf. n. 38 of the *Ratio Fundamentalis institutionis diaconorum permanentium*, CCE, February 22, 1998, which recognizes these principles.

In addition, if a married person received sacred orders without prior permission, ordination might be valid, but it would be seriously unlawful (cf. c. 1025 § 1, in relation to cc. 1037, 1042) and such a person would be *impeded* from exercising the orders received (cf. c. 1044 § 2). Thus, theoretically, there could arise cases where a married person validly acceded to a sacred ministry, and yet a person who had validly received a sacred order could not enter into a valid marriage. In other words, validity of a marriage does not *per se* ("a radice") impede the validity of sacred ordination. An example would be a spouse who, deeming the other spouse deceased, and after the formal declaration of the presumed death, then received the sacrament of order. But the validity of the sacred order does impede "a radice" the validity of an attempted marriage.

3. Chronologically speaking, the impediment arises after acceptance of a *valid* ordination (cf. cc. 1008ff; on fear, see c. 1026 and commentary). Logically, for a *lawful* marriage, the invalidity of ordination must be legitimately verified beforehand either by judicial or administrative decree (cf. cc. 290, 1°, 291). Those acts have *declarative* and not *constitutive* force since "sacred ordination once validly received never becomes invalid" (c. 290).

In contrast, when ordination has been valid, loss of the clerical state either by a legitimately imposed penalty or by rescript of the Apostolic See (cf. c. 290,2°–3°) implies cessation of the rights and obligations inherent in the juridical condition of sacred ministry. The minister is deprived of all offices, functions and power (including delegated powers) and is prohibited from exercising the power of order (cf. cc. 292, save the exception of absolution in danger of death in c. 976, and 1712). But "the loss of the clerical state does not carry with it a dispensation from the obligation of celibacy, which is granted solely by the Roman Pontiff" (c. 291). For that reason, as deduced from the change decided upon by the legislator with respect to the initial proposal in one of the *schemata* for the reform of the Code,[8] it must be understood that dispensation from celibacy is for the clergy a different question from the loss of their condition that is necessary before the Roman Pontiff can concede the dispensation.

For a petition for rescript granted by loss of the clerical juridical condition, *grave* causes are required for deacons, and the gravest of reasons for priests (c. 290, 3°). From the text it can be deduced that this possibility does not apply to persons who have acceded to the episcopate. For a petition for dispensation from celibacy, a prerequisite, the procedure established by the CDF in 1980 must be followed.[9] Reservation of the dispensation to the Holy See (cf. c. 1078 § 2, 1°) is retained even for a *casus perplexus* (cf. c. 1080). Only in danger of death can the local ordinary or other sacred ministers grant a dispensation in the case of the diaconate,

8. Cf. *Comm.* 3 (1971), p. 197.
9. Cf. SCDF, *Normae*, October 14, 1980, in *AAS* 72 (1980), pp. 1132–1137.

and never in the case of the presbyterate (cf. c. 1079; and c. 87 § 2 in relation to c. 291).

4. As we have said, the norm on celibacy for the clergy is distinct from this impediment, so that it is the foundation and explanation, but does not constitute it. Still, dispensation from the law of celibacy has come to be identified with dispensation from the impediment. It cannot strictly be said that with dispensation from celibacy the fact disappears that immediately originated the invalidating norm. In that case we could not strictly speak of dispensation from the impediment, but of elimination of the impediment as the effect of the prior dispensation from celibacy. And we cannot make that statement because the *fact* that *immediately* gives rise to the impediment, that originates it, is not the law of celibacy but acceptance of a valid ordination. However, the purpose of the norm on celibacy goes with the exercise of sacred ministries and also gives rise to a juridical situation that is incompatible with the married state. It follows that when the right and duty to exercise the sacred ministry is lost and dispensation from a situation incompatible with celibacy is granted, such a dispensation is oriented toward enabling the *ius connubii* to be exercised again, even though the objective fact of an ordination validly received persists. And that is exactly the meaning of a dispensation from this impediment.

Regarding the *penalties* established for clergy who attempt marriage, even civil marriage, see cc. 194 § 1, 3° (removal from office), 1041, 3° and 1044 § 1, 3° (irregularity in exercising and receiving orders), and 1394 § 1 (*latae sententiae* suspension and the possibility of expulsion from the clerical state).

1088 **Invalide matrimonium attentant, qui voto publico perpetuo castitatis in instituto religioso adstricti sunt.**

Those who are bound by a public perpetual vow of chastity in a religious institute invalidly attempt marriage.

SOURCES: c. 1073

CROSS REFERENCES: cc. 573 § 2, 574 § 1, 589, 603 § 2, 656,3°–5°, 657 §§ 1–3, 658,1°–2°, 684 § 5, 685 § 2, 691 §§ 1–2, 692, 694 § 1,2°, 701, 712, 731 §§ 1–2, 1041,3°, 1078 §§ 1–2, 1079, 1087, 1191 §§ 1–3, 1192 § 1, 1394 § 2

COMMENTARY

Juan Ignacio Bañares

1. The present text of this canon shows that the matter has been totally reregulated since there has been a change in the criterion used by the legislator to strengthen the obligation to comply with certain sacred vows by providing an invalidating clause concerning the celebration of marriage. Previously, marriages in which one of the parties had given solemn vows typical of religious orders were null and void. Simple vows, which were mainly given in religious congregations, gave rise to an prohivitive impediment unless a special prescription from the Apostolic See (cf. c. 1073 *CIC*/1917) expressly added invalidity, as in the case of the Society of Jesus.

That criterion has been replaced with the current text, which assumes that the old prohivitive impediment has been eliminated. There are two new elements that configure the case, in accordance also with the new regulation of institutes of consecrated life (cf. book II, part III, sect. I). The elements used by the legislator to determine this juridical case are making a vow of chastity, which must be public and perpetual, and that the vow has been made in a religious institute. These are identical to the elements of the impediment in the *CCEO*; cf. c. 805). We shall refer again to these elements.

2. From a moral point of view, the obligation acquired upon making a vow, "a deliberate and free promise … concerning some good which is possible and better" must be fulfilled by virtue of religion (c. 1191 § 1). The gravity of the obligation, however, in itself does not give rise to the nullity of a marriage. From a juridical point of view, the invalidating nature of the norm does not come from the strength of the vow made but from

this specific canon, as so determined by the legislator. The gravity of the vow *justifies* the basis and the purpose of the invalidating nature of the canon, but it does not imply it nor constitute it[1] (see commentary on c. 1987 regarding the law of celibacy for sacred ministers, to which there is a certain analogy).

For the person who has made a vow with such connotations, it is true that there is a spiritual and supernatural commitment, but the vow was freely made after special preparation and is decidedly public. This is true to the point that persons who profess evangelical counsels in institutes of consecrated life, even though they are not a part of the hierarchical structure of the Church, do belong to Church life and sanctity (cf. c. 574 § 1). The fact that they are consecrated directly also affects how they function as a member of the Church's faithful. Similar to what is going on with the impediment of sacred order (see commentary on c. 1087), we therefore do not have here a renunciation *stricto sensu* of the right to marry, which cannot be, but the free assumption of an incompatible juridical situation; its consequence produces suspension of the effectiveness of exercising the right. *Suspension*, as stated earlier, is different from *loss*, and *incompatibility* is different from *renunciation.*[2]

3. The impediment arises from the time of making a *valid* vow. Thus the first requisite is that the vow must be a real vow and not any other sacred bond[3] such as the kind given in a secular institute (cf. c. 712) or by a person embracing eremitical life (cf. c. 603 § 2). This also excludes bonds to societies of apostolic life, which are *not* institutes of consecrated life (cf. c. 731 § 1). Conditions for a *vow* to be valid generally require that it be deliberate and free (c. 1191 § 1), made by a person having an "appropriate use of reason" (c. 1191 § 2) and not made as a result of grave and unjust fear or deceit (c. 1191 § 3). In the specific case of *perpetual profession* in religious institutes, admission and free and lawful acceptance by the Superior are required (cf. 656, 3° and 5°), as are the exclusion of force, grave fear (injustice is not subsequently required) and deceit (cf. c. 656, 4°). There are also the requirements of having reached the age of twenty-one years and having a previous temporary profession for at least three years, with the possibility of anticipation for a just reason, but not by more than three months (cf. cc. 658 and 657 § 3). Logically, even though profession may be null for any reason, for marriage to be *lawful*, nullity must be lawfully established before marriage.

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1. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho Matrimonial Canónico,* 5th ed. (Madrid 1986), p. 85.

2. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios.* III. *Derecho Matrimonial, 1* (Pamplona 1973), pp. 316–317; J.I. BAÑARES, "El «ius connubii,» ¿derecho fundamental del fiel?" in *Fidelium Iura* 3 (1993), p. 251.

3. Cf. *LG* 44; *Comm.* 9 (1977), p. 365.

A *public* vow is a vow received by a lawful Superior in the name of the Church (cf. c. 1192 § 1). Thus the concept per se is broader than the requirement of perpetual profession, although in reality each is contained in the other; as we have seen, it is one of the requirements for the validity of perpetual profession in religious institutes (cf. cc. 658 and 656, 5°). However, by express definition in the Code, "a religious institute is a society in which, in accordance with their own law, the members pronounce public vows ..." (c. 607 § 2).

4. Because of the origin and gravity of the personal obligation involved in a vow, the validity of the dispensation, regardless of who grants it, requires a just cause. In turn, the dispensation implies lifting the obligation assumed and therefore, as part of lifting the obligation, due to the close relationship between dispensation and lifting the obligation, the dispensation also implies exclusion from the canonical condition of religious. In such a case, in contrast to what happens with the impediment in sacred order, strictly there is no dispensation from the impediment. The subject, dispensed from the duty of the vows made and having lost the condition of the religious, has no impediment at all against entering marriage. *Stricto sensu*, a dispensation from the impediment is only the recognition of the termination of the juridical situation of incompatibility with marriage, determined by the canonical condition of the religious in the terms established by the invalidating law.[4]

5. Obviously the impediment can cease when the fact that originated it ceases, such as when the subject transfers from the religious institute to another Church institution whose bonds do not have the required characteristics (cf. cc. 684 § 5, 685 § 2). Outside of that case, in which the impediment ceases because the *fact* that originated it has ceased, the indult to leave requires "very grave reasons" and, if it is an institute of pontifical right, the indult is reserved to the Holy See (c. 691 §§ 1–2). After the indult is lawfully granted, it "carries with it ... a dispensation from the vows and from all obligations arising from profession" (c. 692). The same occurs, ipso facto, when there is a lawful dismissal (cf. c. 701).

In addition, dispensation from the impediment is not reserved to the Holy See except in the case where profession took place in a religious institute of pontifical right (cf. cc. 589 and 1078 § 2, 1°), unless there is danger of death, (cf. c. 1079).

6. But all things considered, this impediment concerns religious profession that, even if there are analogies with the impediment of sacred order, is per se independent. For that reason the object of the impediment includes all members of a religious institute who have made perpetual

4. Cf. T. MAURO, "Gli impedimenti relativi ai vincoli religiosi: ordo, votum, disparitas cultus," in *Gli impedimenti al matrimonio canonico. Scritti in memoria di Ermanno Graziani* (Vatican City 1989), p. 192.

public vows of chastity regardless of whether they may have also received sacred orders (cf. c. 1987). In that case, transfer to another institution, an indult to leave, or dismissal would be cause to lose the condition of the religious and the corresponding impediment would cease to be effective. Sacred order would, however, be retained and thus such a case would continue to be subject to the norm in the preceding canon and to the impediment established therein. Thus, no valid marriage could be entered into before obtaining dispensation from this other impediment.

If a member of a religious institute attempted to marry or married, even "civilly," he would be ipso facto dismissed from the institute (cf. c. 694 § 1, 2°) and would incur *latae sententiae* interdict (cf. c. 1394 § 2) and irregularity for receiving sacred orders (cf. c. 1041, 3°). If he had already been ordained *in sacris*, see also the commentary on c. 1087. The penalties would then be cumulative in the case of c. 1044 § 1, 3° and alternately, in the case of c. 1394 § 1.

1089 **Inter virum et mulierem abductam vel saltem retentam intuitu matrimonii cum ea contrahendi, nullum matrimonium consistere potest, nisi postea mulier a raptore separata et in loco tuto ac libero constituta, matrimonium sponte eligat.**

No marriage can exist between a man and a woman who has been abducted, or at least detained, with a view to contracting a marriage with her, unless the woman, after she has been separated from her abductor and established in a safe and free place, chooses marriage of her own accord.

SOURCES: c. 1074 §§ 1 and 2

CROSS REFERENCES: cc. 90, 1057 §§ 1–2, 1078, 1101 § 2, 1103, 1397

COMMENTARY

Juan Ignacio Bañares

1. The type of case described in this canon starts with the forced presence of a woman with a man who intends to marry her. However, the concept and regulation of abduction have undergone interesting historical changes. In the old law, this situation was considered to be one of the cases that could cause a marriage to be null due to fear or force.[1] The Council of Trent introduced this regulation as an impediment and c. 1074 of *CIC*/1917 included it, making abduction equivalent to forced detention (§ 3); thus physical transport from one place to another was not a requisite. The elements that constituted the impediment were *a)* the initial moment when the abductor transported the woman and kept her in his power or when he kept her by force in a place where she was, of her own free will; *b)* the abductor's intention to marry the abducted woman; *c)* the cessation of the impediment, which was determined when the woman was separated from her abductor and established in a safe and free place.

The present canon combines the concepts of abduction and detention without specifying that detention be forced. The interpretation is that the express use of physical or moral force is unnecessary.The act of keeping a woman in a place against her will is sufficient, (perhaps because force is necessarily implicit in keeping her in a place against her will), and also so as to include deceitful action, which jurisprudence equates with

1. Cf. P. GASPARRI, *Tractatus canonicus de matrimonio* (Rome 1932), no. 636.

force or fear. This shows that the evil to be avoided is not so much the use of force by the abductor as the loss of the woman's effective freedom to escape from his power. If there is deceit, the woman could lose her freedom even when there is still a physical possibility of escaping from the place of confinement. Obviously, if from the beginning the woman consented to the abduction or detention, it cannot properly even be called abduction, only elopement; and it cannot strictly be said to be detention. There would be no impediment if the woman's acquiescence were proved either by her own confession and the testimony of other credible persons or by the circumstances surrounding the marriage ceremony or by other preceding or subsequent indications.

The move of abduction from the area of consent to the area of impediments explains some of the peculiarities of this norm. As for the *rise* and *cessation* of the impediment, they occur ipso facto when the required circumstances occur, even though paradoxically they have their origin and end in the will of one of the parties. Furthermore, because the impediment refers to the relationship between the two parties, even though it comes from human positive law, for the impediment to exist it suffices that at least one of the two parties be subject to canon law.

2. Concerning the *intent* to marry the abducted woman, we must clarify that this is an essential requisite. If the abductor does not intend to marry the woman when he transports or detains her, the impediment as such does not arise. A few examples can illustrate this. If a woman kidnapped for money or as a hostage seduces her kidnapper, there is no impediment because in that case her detention would have no relation whatsoever with the intention to marry, and no causal nexus between the two events could be established. It would be a different matter if the person who kidnapped a woman for money at a given time intended to enter into marriage with her. The moment the kidnapper intends to marry her, the impediment arises, for he becomes an abductor. On the other hand, theoretically the impediment would also not arise between an abducted woman and the material author of the transport if the transporter were merely acting on orders from the abductor and had no intention of marrying her when he transported her, nor could he be called the author of the forced detention.

3. With respect to how the impediment *works*, it is similar to the others; it takes place *objectively*, impeding the *aptitude* or ability of the person to marry regardless of being qualified to perform a perfectly free and naturally sufficient act of marital will. In other words, even though the abducted woman wanted to enter into marriage and gave complete and adequate consent (cf. c. 1057 § 2), the marriage would be null and void so long as the circumstances of the abduction persisted, since impediments act as a prerequisite to marital consent (cf. c. 1057 § 1, which requires persons who are "iure habiles"). Therefore the *end* of the impediment is not simply

subject to the will of the parties, but must be verified through the objective circumstances required by the text of the law, as we shall see next.

4. Respecting the connection with other chapters of nullity included in the defect or flaw of consent (such as fear or force: c. 1103; or simulation: c. 1101 § 2), it is well to remember that those chapters should be understood to be cumulative with this impediment. Establishing abduction as this type of impediment suggests that the legislator specifically intended to cover cases without a defect or flaw of consent in the required degree, or where proof would be difficult. In other words, if there were the objective circumstances required for this impediment to arise, the marriage would be null for that reason. If, in addition, for example, the woman feigned consent, the marriage would also be null and void under simulation. Or if the woman were in the grip of fear described as a separate chapter under defect of consent, this reason for nullity would be added to the reason of abduction. It is another matter that, from the point of view of procedural economy, it suffices to allege and to prove one of those elements. The chapters on fear and simulation, however, are indeed incompatible with each other.

5. As for the *purpose of the norm*, we may conclude that the legislator was trying not to protect the freedom of the act of consent at the actual time it is given, but rather to protect this freedom throughout the entire *process of forming* the marital will. Thus, not only must the *act* of consent be free, but also, when we have the anomalous circumstances that constitute abduction, there must have been at least the option of *starting over* with the question after *the person* recovered full freedom. This characteristic of involving only the *in fieri* and not the *in facto esse* of marriage, since the legislator has nothing against a marriage between abductor and abducted woman beyond the situation of abduction, is certainly another peculiarity of this impediment.[2]

6. Regarding *whether or not the impediment of abduction should presently be retained*, there are diverse points of view. For some, the treatment in this canon may seem discriminatory against the man, for the legislator expressly rejects making man and woman equal. Thus, the impediment does not arise if the abductor is a woman and the abducted person is a man. At the other extreme, it may seem that today the whole situation is an anachronism and the value of a specific impediment for these cases may be called into question. The responses of the persons who worked on reforming the Code were eminently practical for both questions. It appears there is no historical basis nor are there current statistics (cases of abduction do, in fact, affect women) supporting the inclusion of men as abducted persons along with women.[3] On the other hand, there

2. Cf. J.M. GONZÁLEZ DEL VALLE, *Derecho Canónico Matrimonial según el Código de 1983*, 3rd ed. (Pamplona 1985), pp. 108, 110–111.
3. Cf. *Comm.* 9 (1977), p. 366.

does seem to be a reason to retain the invalidating norm.[4] It was history that caused it and history, the reality of today's social behavior, makes it advisable to keep the norm. There can be no doubt that these are functional criteria, if there were no more abductions or if there were a significant number of abductions of men by women, a change in the scope of the norm or its elimination would probably be reasonable. In fact, in the parallel canon of the *CCEO* no distinction is made between man, abductor, and woman, abducted, the norm speaks only of "persona abducta vel saltem retenta" (c. 806 *CCEO*).

7. We have already generically referred to the moment when the impediment *ceases*. Now we can discuss the *requirements* involved. For the impediment to cease the text of the Code requires that the woman be separated from the abductor and established in a free and safe place. That means: *a)* In all cases the woman must be physically *transported* to another place from where the abductor is. Separation is a prior required step (obviously separation may in certain cases be on the part of the abductor, for example, in case detention had been in the woman's residence. *b)* Furthermore, the *place* "ad quem" the woman was transported must be describable as free and safe. Thus the conditions of free and safe apply objectively[5] to the place and not to the woman. And for the impediment to cease, the woman must be aware that the place where she is, is away from her abductor's power. If the woman, even in the knowledge of the actual conditions of freedom and safety of the place where she is, were to continue feeling subjected and forced, we would have the elements that constitute fear, which would fall under consent. *c)* However, the fact that the place is free and safe means relative to the abductor. No place could be considered free and safe if it still were within direct or indirect reach of the abductor. *d)* Since no time limit is given for the woman to be in a free and safe place, it would be sufficient to verify that she effectively knew she had been transported to such a place.

8. Although the easiest and fastest way to end the impediment is ordinarily to put the circumstances in place that ipso facto give rise to its cessation, however, at least theoretically, there is the dispensation. A *dispensation* may be granted by the local ordinary (cf. c. 1078). Still, because of the peculiarity of the impediment and its possible effect on the situation in other chapters of nullity referring to consent, the following steps should be taken: *a)* Verify how urgent it is to celebrate the marriage. *b)* Check that it is impossible or at least gravely difficult to cause the impediment to cease naturally. *c)* Verify that there is a proportionate just cause, required for the dispensation to be valid (cf. c. 90). *d)* Assess the mental condition

4. Cf. *Comm.* 9 (1977), p. 366.

5. Cf. U. NAVARRETE, "Gli impedimenti relativi alla dignità dell'uomo: aetas, raptus, crimen," in *Gli impedimenti al matrimonio canonico. Scritti in memoria di Ermanno Graziani* (Vatican City 1989), pp. 86–87.

of the woman and ensure that her consent is sufficiently natural or, to put it negatively, that there are no defects in her consent, especially defects due to force and fear. In practice, for all the above reasons, a dispensation is not usually granted.

9. As an *offense*, in the present Code abduction or detention has lost the explicit reference to intended lechery or marriage (which was included in the old c. 2353 *CIC*/1917). As an offense it is included in the generic case of kidnapping or forced detention of any individual through force or deceit, regardless of intention or purpose (cf. c. 1397).

1090 **§ 1. Qui intuitu matrimonii cum certa persona ineundi, huius coniugi vel proprio coniugi mortem intulerit, invalide hoc matrimonium attentat.**

§ 2. Invalide quoque matrimonium inter se attentant qui mutua opera physica vel morali mortem coniugi intulerunt.

§ 1. One who, with a view to entering marriage with a particular person, has killed that person's spouse, or his or her own spouse, invalidly attempts this marriage.

§ 2. They also invalidly attempt marriage with each other who, by mutual physical or moral action, brought about the death of either's spouse.

SOURCES: § 1: c. 1075,2°
§ 2: c. 1075,3°

CROSS REFERENCES: cc. 1078 § 2,2°, 1079, 1080, 1336, 1397

COMMENTARY

Juan Ignacio Bañares

1. Historically, as well as in c. 1075 of *CIC*/1917, this norm was designed to protect the institution of marriage from certain especially grave behavior that directly threatened the inviolability (consummated adultery) or permanence (attempt to marry, including civilly, or killing a spouse) of the marital bond. The impediment affected the following cases: *a)* anyone who during marriage committed adultery and who promised to marry or attempted a new marriage (cf. c. 1075, 1° *CIC*/1917); *b)* anyone who during marriage committed adultery and one of the adulterers killed the spouse (cf. c. 1075, 2° *CIC*/1917); *c)* anyone who freely cooperated in killing the spouse of either adulterer (cf. c. 1075, 3° *CIC*/1917).

With respect to the married condition, the legislator was attempting to protect the goods that ensure the dignity and sanctity of marriage, and also to protect the spouses in relation to those goods. *With respect to the faithful,* the legislator was trying to protect good example, to avoid the scandal produced by access to marriage by those who could marry using such grave and unlawful means. *With respect to potential offenders,* the legislator was attempting to avoid that a desirable effect for them, their future marriage, might have a close connection with the offenses that had harmed the preceding spouse. Thus anyone who committed those offenses would be discouraged by the establishment of some kind of

relationship between the offenses and a later attempt to marry the accomplice or the spouse of the victim. It was hoped to prevent the commission of offenses that are gravely harmful to a specific marriage from at the same time, being turned into the means of causing a valid conjugal relationship between the persons directly implicated because of the marital bond. For those reasons the impediment was, and still is *relative* in nature; it affects only marriage between such persons.

2. The present canon does not mention adultery as one of the circumstances that give rise to the impediment. This means that the scope of the canon, although apparently now centered on protecting the lives of the spouses, does so by being a necessary and sufficient condition for the permanence of the bond. Therein lies the formality of the impediment.[1] The reasons adduced for the canon in *CIC*/1917 are also valid as the foundation of the present canon, although they should be limited to only one of the goods protected therein. Still, we must not forget that even in *CIC*/1917, adultery was relevant precisely when it accompanied a promise of marriage or was followed by an act attempting marriage or by the murder of a spouse; when it was accompanied by an intention to marry and referred to the end of the existing bond.

3. The *cases* covered in the text of the present Code are the following: *a)* causing the death of one's own spouse so as to enter into marriage with another specific person; or causing the death of another's spouse for the purpose of marrying that person; *b)* both parties cooperating in the death of the spouse of either one (§ 2). The parallel canon of the *CCEO* (c. 807) does not include variations.

In *both cases*, the following elements must be present for the impediment to arise: *a)* At least one of the two parties must be Catholic. *b)* The marriage that united one of the parties with the murdered spouse must have been valid. *c)* The murder must have been consummated; that means that the death of the spouse must have effectively been the result of the violent action so that a cause and effect may be established between the action and the death. Thus an attempted or failed murder of a spouse is not sufficient. In both cases the impediment may be doubled (e.g., if the two parties had each caused the death of their own spouse); it would be required to give notice of the doubled impediment when requesting a dispensation, for there would have been several different offenses committed (including if there was only one act of killing). In either case the impediment arises from the fact of the offense; it is not necessary for any juridical act to impute it to the authors (e.g., by a judicial decision).

4. In addition, in the *first case*, two other conditions are necessary. The *first* is that one of the parties must really be the *author* of the offense. For this purpose it does not matter whether the spouse was the material

1. Cf. J. FORNÉS, *Derecho matrimonial canónico*, repr. (Madrid 1992), p. 81; cf. R. LLANO CIFUENTES, *Novo Direito Matrimonial Canônico* (Rio de Janeiro 1990), p. 261.

author of the act of killing or whether the spouse acted through a third party, if authorship of the act can actually be imputed to that spouse. For the impediment to arise, it is not necessary for the other future party to be in agreement, to approve or even to know about the project or that it actually have been committed. The impediment arises even if the other party had opposed or disapproved of the act. It is also irrelevant whether the victim of the offense was the spouse of the murderer or of the other party.

The *second* condition for the first case requires *intention* on the part of the person committing the offense to enter into a future marriage with the other party.[2] The intent must refer to a certain person (who has been "determined").If someone has killed his or her *own* spouse, the impediment arises only between the murderer and the specific person whom he or she intended to marry afterwards. If the victim is the spouse of another person, the impediment would arise only if, at the moment of the act of killing, the murderer intended to marry the surviving spouse. In both situations the purpose of the invalidating norm is not so much to punish the act of murder per se, (it has its own penalties, as we shall see), as it is to prevent a person from using murder as a means to break a bond that prevents him from marrying a specific person. For that reason the impediment is not *absolute.*

5. The *second* case, in addition to the common requirements already mentioned, also requires the following. There must be specific knowledge and approval by both parties of the purpose of the act to be committed. Both must participate in such a way that their joint action can be called mutual cooperation, regardless of whether it is physical or moral cooperation. Their joint act must be the effective cause of the death of the spouse, even if the murder was actually committed by a third party.

From these requirements for the second case, it can be deduced, first that if either party is unaware of, disapproves of or does not cooperate even morally in the act of the other party, the case described in this paragraph of the canon would not arise.The impediment would arise anyway, for the case would ipso facto fall under § 1 of the canon, provided that the murderer intended to marry the other party.

Secondly, it can be deduced that this second case refers to a situation where there is no intention to marry each other in the future; it suffices for the fact to exist with the required circumstances. This conclusion can be supported by the fact that the text of the canon omits any reference to that condition. It is clear that the "quoque" refers to the repetition of the words "invalide attentant," and it would be overreaching to try to include in this term a reference to the need for intention to marry. On the other hand, if this requirement were admitted for the case in § 2, all its content would be superfluous because if, according to § 1, it suffices that one of

2. Cf. *Comm.* 9 (1977), p. 366.

them commits spousal murder with intent to marry the other party for the impediment to arise, then including a § 2 simply to refer expressly to "mutual cooperation" would merely duplicate the preceding paragraph. In addition, if the impediment had been actually limited to protecting the spouses' lives, it would be reasonable to deny marriage between persons who have intentionally ended the life of one of them. The reason of good example, avoiding scandal among the faithful, previously adduced, is especially valid for this case.[3] Finally, in the work of the reform Commission there was discussion on the possible omission of the words "intuitu matrimonii" from § 1 and it was finally decided to retain them. That indicates that the absence of those words from § 2 did not pass unnoticed by the legislator.[4]

6. Regarding *dispensation*, in either case it is reserved to the Holy See (cf. c. 1078 § 2, 2°); but neither case is excluded from the option offered in cc. 1079 (referring to the danger of death) and 1080 (referring to the so-called *casus perplexus*). However, in practice, dispensations have been limited to the case of occult murder of a spouse, and even them, according to Gasparri, "rarely, with grave difficulty and not without urgent reason."[5]

7. From the *penal point of view*, the scope of the offense is not the same as the impediment. Not only murder, but also the offense of mutilation or grave injury "is to be punished ... with the deprivations and prohibitions mentioned in c. 1336" (c. 1397). Thus anyone who acted as described in c. 1090 but did not cause death as intended, if the victim were only gravely injured, would not be affected by the impediment. For penal purposes, however, such a person would incur the delict described in c. 1397.

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3. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho Matrimonial Canónico*, 5th ed. (Madrid 1986), p. 95.
4. Cf. *Comm.* 9 (1977), pp. 366–367.
5. P. GASPARRI, *Tractatus canonicus de matrimonio* (Rome 1932), no. 683.

1091 **§ 1. In linea recta consanguinitatis matrimonium irritum est inter omnes ascendentes et descendentes tum legitimos tum naturales.**

§ 2. In linea collaterali irritum est usque ad quartum gradum inclusive.

§ 3. Impedimentum consanguinitatis non multiplicatur.

§ 4. Numquam matrimonium permittatur, si quod subest dubium num partes sint consanguineae in aliquo gradu lineae rectae aut in secundo gradu lineae collateralis.

§ 1. Marriage is invalid between those related by consanguinity in all degrees of the direct line, whether ascending or descending, legitimate or natural.

§ 2. In the collateral line, it is invalid up to the fourth degree inclusive.

§ 3. The impediment of consanguinity is not multiplied.

§ 4. A marriage is never to be permitted if a doubt exists as to whether the parties are related by consanguinity in any degree of the direct line, or in the second degree of the collateral line.

SOURCES: § 1: c. 1076 § 1
§ 2: c. 1076 § 2
§ 3: c. 1076 § 3

CROSS REFERENCES: cc. 108 §§ 1–3, 109 §§ 1–2, 1078 § 3, 1092

COMMENTARY

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1. Procreation gives rise to a peculiar type of relationship, consanguinity, that contains various elements. First, it necessarily implies a biological substrate that would be either direct procreation (yielding a relationship of ascendants or descendants, called the *direct line*) or proximity on the common genealogical tree. The latter refers to the relationship between persons born of the same parents, with no relationship of direct ancestry between them, such as brothers and sisters, cousins, aunts and uncles, nieces and nephews, called the *collateral line*).

Secondly, consanguinity implies a *factum*, a sociological event linked to the culture of the time, place and personal and collective circumstances. This is the degree of closeness between persons united by the

factum, depending upon the common trust and interests that theoretically arise from the relationship. A family relationship tends to unite persons more spontaneously, naturally and easily because of their specific proximity and intimacy, but there is also the risk of disrupting the relationship, as we shall be indicating later.

Thirdly, this relationship establishes a *constitutive* datum.It gives rise to the family as a kind of unit; it imprints an identity upon it and distinguishes it from other family nuclei in the social environment.

2. The first substrate implies a biological connection that establishes the relationships within a family, relationships that are different from each other and different from the spousal relationship. Furthermore, in some way it contrasts the parental relationship with the spousal relationship, since it is the spousal relationship that produces parenthood (there is a contrast here between cause and effect). The spousal relationship is fontal, whereas parenthood by definition inevitably flows from that relationship. Hence the nullity of marriage between parents and children is seen as founded on divine and natural law.Indeed, such an unequal relationship of direct and immediate descendants (parenthood-filiation) appears to be not very compatible with the basic equality between spouses. It is impossible to combine and take on the relationship of child along with the relationship of spouse of one's own mother or father.

Something similar occurs between all ascendants and descendants. Being the spouse of the mother or father of one of one's own parents (being the spouse of one's grandmother or grandfather) would assume direct descendancy (unequal by nature), a spousal relationship (equal by nature) and a double relationship with respect to one's own parents, that of child and also of the spouse who engendered one of them.

With regard to kin in the second degree of the collateral line, brothers and sisters, the question that arises is not the inequality arising from the relationship as in the two previous cases, but the fraternity that makes them naturally equal to each other. It might seem that there would then be no problem in establishing another relationship, such as a spousal relationship, which is also equal and equalizing. We can see, however, that the role of sexual differences in a fraternal relationship, between brother and sister, is substantially different from the role of sexual differences in a spousal relationship. The fraternal relationship does not change depending upon sex, but is equal between brothers and sisters. Thus the meaning of fraternity is the same, regardless of sex.In constrast, the meaning of conjugality is directly shaped by whether one is a man (husband) or a woman (wife).

Hence the majority of the doctrine sees that there is a serious and reasonable probability that these last two degrees, the entire direct line and the second degree of the collateral line, are also contained in natural

law.[1] Hence also, the legislator has maintained that not only can these cases never be dispensed (cf. c. 1078 § 3), but that marriage must never be allowed if there is any doubt about the existence of any of these degrees of consanguinity (c. 1091 § 4).[2]

3. The sociological *factum* we spoke of earlier has led the Church and nearly all States to be careful that the proximity, familiarity and trust that are typical of consanguinity are not confused with the type of relationship that leads to marital union, and that they do not lead to deviant behavior nor cause abuse of authority or trust. The objective of the norm is directed toward protecting the dignity and specific nature of the family closeness that biologically produces kinship among relatives. Thus any hope that a possible future marriage might lead to using this closeness improperly is avoided, for it would harm both moral principles and the principle of trust and closeness that governs the parental relationship. Thus, in times when families live more united, longer, and with varying degrees of relatives, the scope of the impediment should be broadened to achieve that purpose. On the other hand, in present day circumstances, there are many placed where the effective living together of the families has been much reduced, causing the legislator to limit the situations envisioned by the impediment. In addition, perhaps in the near future new problems will have to be faced that may be caused by abuse of the new technology for genetic manipulation that introduces new biological and sociological situations.[3]

4. Earlier we referred to the constitutive *characteristics of the family* that involve procreation and blood relationship. We noted that these characteristics give a family identity and distinguish one family from another. Now, the Church has always tried to stimulate Christian families in such a way that this identity does not become closed or locked into its own limits, but that families remain open to connection with other families of a different line. Although the Church goes so far as to allow marriages that might go against the nature of marriage or the family, it does, (by means of an invalidating clause), prohibit marriages between collateral relatives up to and including the fourth degree (first cousins; in *CIC*/1917 the scope of the impediment was also broader and included second cousins).

5. Now that we have discussed the foundation and meaning of this impediment, we should refer to its beginning and end and the manner of verifying its scope in any given case. As for when it *arises*, it depends solely upon the biological fact of procreation, regardless of whether the act is unlawful or whether the consequent relationship is unlawful or natural (c. 1091 § 1). In addition, it suffices for one of the spouses in the

1. Cf. F. AZNAR GIL, commentary on c. 1091, in *Salamanca Com.*
2. Cf. *Comm.* 9 (1977), p. 367.
3. Cf. P. MONETA, *Il matrimonio nel nuovo diritto canonico*, 2nd ed. (Genoa 1991), pp. 89–90.

common line to be an ascendant. (Canon 808 of the *CCEO* is identical, except that it does not explicitly include the clarification "tum legitimos tum naturales").

When the impediment *ends*, since when it arises it automatically produces a perpetual relationship, that of kinship, it can end only through a *dispensation*. Apart from the degrees prohibited by the legislator, dispensation for the other degrees is granted by the local ordinary, for there is no reservation to the Holy See. Just cause should obviously measure the closeness of the relationship between the contracting parties. Since this canon expressly states that the impediment cannot be multiplied (cf. c. 1091 § 2, in contrast to c. 1076 § 2 *CIC*/1917), it seems reasonable to conclude that when dispensation is sought, only mention of the closest degree of consanguinity between the parties can be required.

6. Regarding the question of *how to verify* the specific scope of consanguinity *in casu*, we must remember that the Code has replaced the old system of reckoning degrees.This was based on Germanic law, and the present system (see c. 108 and commentary), is based on Roman-civil law and more commonly on legislation by the State.

1092 Affinitas in linea recta dirimit matrimonium in quolibet gradu.

Affinity in any degree of the direct line invalidates marriage.

SOURCES: c. 1077 § 1; CodCom Resp. IV, 5, 2–3, jun. 1918 (*AAS* 10 [1918] 346); SCHO Resp., 31 jan. 1957 (*AAS* 49 [1957] 77)

CROSS REFERENCES: cc. 108 §§ 1–3, 109 §§ 1–2, 1078 §§ 1–3, 1091, 1093

COMMENTARY

Juan Ignacio Bañares

1. Affinity is the relationship arising "from a valid marriage, even if not consummated, and it exists between the man and the blood relations of the woman, and likewise between the woman and the blood relations of the man" (c. 109 § 1).

2. The foundation of this canon is principally based on the fact that the marital relationship not only joins the spouses as individuals, but also introduces each spouse into the other's family. It therefore is not related to procreation, but is principally related to conjugality, specifically, to the condition of being a spouse. Thence emerge two principal reasons. The first lies in the fact that relations within family life are specific and different from the marital relationship. The second is that inclusion within a family assumes incorporation into a system of established relationships among its members, formed by mutually participating in intimacy in an atmosphere of naturalness and trust.

The objective of this canon is to defend the family climate, to avoid having the conditions of particular proximity and common participation used to promote deviate behavior among family members that might tend toward a possible future marriage (see the reasons, which may be analogically applied here, adduced in the commentary on c. 1091).

3. The norm is clearly from positive law. Therefore the present regulation has varied substantially in some respects, as we shall now see. The requirements are the following: *a)* There must be a valid marriage. Therefore, the impediment would not arise from a null marriage, even if putative, nor from an extramarital relationship, even though stable. It does, however, arise from a valid marriage entered into in infidelity "for marriages planned after the baptism of at least one of the parties."[1] *b)* The

1. Cf. SCHO, Replies, January 30, 1957, in *AAS* 49 (1957), p. 77.

impediment begins with the fact of a valid celebration of marriage, and the marriage does not need to be consummated (cf. c. 109 § 1). It would therefore arise even after a dispensation from a ratified and unconsummated marriage. *c)* It refers to the blood relatives of the other spouse depending upon whether the relationship of consanguinity is real, regardless of whether or not it is legitimate (cf. c. 1091 § 1). *d)* Affinity is reckoned by making it equivalent to the line and degree of consanguinity existing between the spouse and the relative in question (a spouse is related to a relative of the other spouse in the same line and degree that the spouse in question and that relative are; cf. c. 109 § 2).

4. *CIC*/1917 declared that a marriage was null that had been entered into by persons related in any degree of the direct line and up to the second degree inclusive in the collateral line (according to the former system of reckoning; cf. cc. 1077 § 1 and 96 *CIC*/1917). It also admitted multiplication of the impediment (cf. c. 1077 § 2 *CIC*/1917). The present canon has simplified the norm by markedly reducing the scope: *a)* It includes no cases in the collateral line. *b)* Consequently, there is no longer a possibility of multiplying the impediment, which basically served to bring to the attention of the ecclesiastical authorities the gravity of the reasons required for dispensation.[2]

At first it might seem that restricting the scope of the impediment weakens the reasons for establishing it. In fact, in the first *schemata* of the Code's reform the impediment was retained up to the second degree in the collateral line (brothers and sisters of the spouse). However, most of the consultors on the corresponding Commission deemed that, under the present circumstances, those marriages are usually beneficial for children born of the prior marriage.[3] Here we see how the same reason that gave rise to an invalidating law may also be a reason to eliminate it when the circumstances are deemed to have changed. Formerly the possible risks deriving from familiarity between persons so closely related were emphasized. Now it is felt that, for the offspring of the deceased person, this degree of closeness may facilitate access by a well-known person as the new parent. In addition, it is also possible that if, before it was the *marital* relationship that was looked at, now the legislator weighs the *parental-filial* relationship, which seems to make the marriage advisable. In c. 809 of the *CCEO*, however, the invalidating nature of the second degree in the collateral line is retained, but the relevance of any multiplication of the impediment is expressly excluded.

2. Cf. K. BOCCAFOLA, "Gli impedimenti relativi ai vincoli etico-giuridici tra le persone: affinitas, consanguinitas, publica honestas, cognatio legalis," in *Gli impedimenti al matrimonio canonico. Scritti in memoria di Ermanno Graziani* (Vatican City 1989), pp. 208–209.

3. Cf. *Comm.* 9 (1977), p. 368.

At the same time, it is easy to see why the nullity of a marriage entered into between persons related in the direct line has been retained, for the difference between the two is great. Indeed, parenthood between the spouse's ascendant and the spouse is originating and fontal. It gives rise to a basically unequal relationship compared to the relationship of filiation. And yet, a fraternal relationship between persons of the same sex (a husband and his brother or a wife and her sister) not only makes them equal for each, but also makes them equal, (regarding their sex), with respect to the spouse of either one (in contrast to what would happen in the case in c. 1091).

For all of the above reasons, in fact, *dispensation* from this impediment is not usually granted except for exceptional cases. The power to dispense from this case was not included in *CIC*/1917, not even in the cases granted to local Ordinaries for instances of danger of death (cf. c. 1043, *CIC*/1917). In *De Episcoporum muneribus* IX, 15, when affinity occurred in the direct line, dispensation was reserved to the Holy See. The Code has lifted that reservation (cf. c. 1078 §§ 2–3), therefore dispensation is for the local ordinary.

1093 Impedimentum publicae honestatis oritur ex matrimonio invalido post instauratam vitam communem aut ex notorio vel publico concubinatu; et nuptias dirimit in primo gradu lineae rectae inter virum et consanguineas mulieris, ac vice versa.

The impediment of public propriety arises when a couple live together after an invalid marriage, or from a notorious or public concubinage. It invalidates marriage in the first degree of the direct line between the man and those related by consanguinity to the woman, and vice versa.

SOURCES: c. 1078; CodCom Resp. II, 12 mar. 1929 (*AAS* 21 [1927] 170)

CROSS REFERENCES: cc. 1061 § 2–3, 1078 §§ 1–3, 1079, 1080, 1091 §§ 1 and 4, 1092

COMMENTARY

Juan Ignacio Bañares

1. The impediment of public propriety has the same foundation and objective as the impediment of affinity (c. 1092), although in the case of affinity, especially for concubinage, the legislator's intention to protect moral principles and avoid possible scandals is more pronounced (for other reasons, in particular referring to the case of a null marriage, see commentary on c. 1092).

The situation that *gives rise* to this impediment is substantially and formally different from the preceding canon, for affinity arises as actual kinship between each spouse and the blood relatives of the other spouse. In contrast, the impediment in this case occurs without a real marriage, and therefore without real kinship, when even so there has been a quasi-marital relationship at the same time either because the marriage was invalid or because there was a public or notorious concubine relationship. It is precisely the *similarity* with married life that causes the invalidating norm.

2. With regard to an *invalid marriage*, for the impediment to arise the following considerations must be taken into account: *a)* There must have been the appearance of a valid marriage at its beginning. From the meaning of the canon and by analogy with affinity, the impediment may also arise if an invalid marriage was entered into in infidelity, provided that at least one of the putative spouses had later been baptized. *b)* If the preceding requisite is applicable, the norm causing the marriage to be null

is irrelevant. Although the effect of that norm on a case of no consent has been discussed, still, the literal meaning of this canon reveals no intention on the part of the legislator to limit its scope to any specific types of nullity or to exclude any types. *c)* The good faith of the pseudo-spouses is also irrelevant. *d)* A civil marriage does not give rise to this impediment, for such a marriage contradicts the first required condition (as we shall see below). *e)* In contrast to c. 1078 *CIC*/1917, there is no reference whatsoever to consummation. *f)* It is required, however, that they have begun a common life. We shall discuss these last points briefly.

3. The change of terms (replacing a reference to consummation with the expression "when a couple live together") from the preceding regulation poses certain practical difficulties. First, it is essential to define what is meant by "when a couple live together" and when their living together may be said to have begun *in casu*. Second, there is the difficulty of the possibility of having consummated the marriage without having actually begun to live together. In that case, since the legislator's intention seem to be simply to improve the wording of the old canon, which expressly indicated that consummation was not necessary for the impediment to arise, it could be that consummation is a *presumption* of living together.No doubt living together is a nuclear element in the communal life of marriage. Especially since the words that the legislator tried to improve stated "sive consummato, sive non," it appears that he intended rather to exclude the impediment if there had been no consummation nor even living together. Previously, the impediment arose from the celebration of the apparent marriage. I believe that it means that the impediment does not require consummation to arise, living together suffices. In the opposite sense, consummation is a presumption of living together.

4. With respect to the second case covered in the canon, *notorious* or *public concubinage*, there are also certain particular characteristics to be pointed out. First, for concubinage to be real, the following elements must be present: *a)* The basis is a relationship between a man and a woman *living together* that includes participation in sexual intimacy. It is living together and performing the acts typical of marriage and the fact of giving one's body that makes concubinage similar to real married life. *b)* This relationship cannot have begun with any appearance of canonical marriage; otherwise we would have the preceding case. *c)* The relationship must exist between the two subjects, but it is irrelevant whether they are married or unmarried. *d)* Concubinage must be shown to have lasted a certain period of time to give the state an impression of stability. There is no specific period of time, for here a subjective element comes into play. A relatively permanent volition is required of both subjects, a tendency to continue in the mutual relationship as distinguished from the simple multiplication of isolated facts that are disconnected from any intersubjective relation. *e)* For those reasons, for someone obligated to follow canonical form, a so-called "civil marriage" would be included in this case and would

give rise to the impediment provided that after celebration of the marriage the couple had lived together. In fact, during the process of reforming *CIC*/1917, after a proposal to consider a civil marriage as invalid due to defect of form,[1] it was preferred not to include it in that concept; it was thought that such a classification could "truly lead to erroneous conclusions."[2] On the other hand, c. 810 of the *CCEO* (§ 1, 3°) expressly establishes that this impediment arises for those who, being subject to the form of celebration prescribed by law, "matrimonium attentaverunt coram officiali civili aut ministro acatholico."

Secondly, the norm requires that concubinage be *public* or *notorious*. According to *CIC*/1917, a *public* offense is one that has been divulged or "that can and should be prudently judged to be easily divulged" either because of the way it was committed or for other circumstances (c. 2197, 1° *CIC*/1917). Note that there is no reason for the risk of divulgation to be the same as the possibility of proof. Note also that the relationship need not be explicitly known, de facto, to be concubinage, it suffices that the fact itself is known. If the parties had been held to be husband and wife, the scandal of a new marriage could not be avoided, because the new marriage would bring out the concubine nature of the prior union.[3]

Notoriety in law presupposes a set specific juridical act. It could be a confession by the offender in court or a valid ecclesiastical or civil decision that has become *res judicata* (cf. 2197, 2° *CIC*/1917). *De facto notoriety* occurs when there is public knowledge and it cannot be hidden nor protected with any excuse (cf. c. 2197, 3° *CIC*/1917).

5. The *scope* of the impediment extends only to the first degree in the direct line. It affects each partner with the immediate ascendant or descendant of the other pseudo-spouse or accomplice. In this case the scope of application of this invalidating norm has also been limited, for *CIC*/1917 included relatives of the second degree in the direct line.

6. Since the impediment is perpetual, it *ceases* only when the putative spouses or persons living in concubinage, if that is the case, regularize their situation and enter into a valid marriage with each other. In that case, however, the impediment of affinity of the preceding canon would come into effect. Therefore, in reality, even though the invalidating effect would remain the same, there would be a different impediment because it was based on the formality, which is different in substance, of a true bond.

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1. Cf. *Schema Codicis Iuris Canonici* (Vatican City 1980), c. 1014 § 4.
2. *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Vatican City 1981), p. 247, (at c. 1014 of the 1980 *Schema*).
3. Cf. F.X. WERNZ–P. VIDAL, *Ius Canonicum*, V (Rome 1928), no. 378 (note 32); J. MANS, *Derecho matrimonial Canónico*, vol. 1 (Barcelona 1959), pp. 280–281.

Even so, some authors maintain that for those cases the two impediments should be added together.

7. *Dispensation* is the responsibility of the local ordinary (cf. c. 1078 §§ 1–2). To grant it, in addition to having proportionate cause, it is necessary to arrive at the certainty that there is no danger of a direct relationship of parent-child between the two parties. In that case we would have a case of consanguinity of a kind from which there can never be dispensation (cf. cc. 1078 § 3, 1091 § 4).

1094 Matrimonium inter se valide contrahere nequeunt qui cognatione legali ex adoptione orta, in linea recta aut in secundo gradu lineae collateralis, coniuncti sunt.

Those who are legally related by reason of adoption cannot validly marry each other if their relationship is in the direct line or in the second degree of the collateral line.

SOURCES: c. 1080

CROSS REFERENCES: c. 110

COMMENTARY

Joaquín Mantecón

The legal relationship arising from adoption is an impediment to marriage in the direct line and in the second degree of the collateral line. This canon does not indicate what is meant by legal relationship arising from adoption, but the concept is found in c. 110, according to which, "filii, qui ad normam legis civilis adoptati sint, habentur ut filii eius vel eorum qui eos adoptaverint." This means that from adoption "ad normam legis civilis." In canon law there arises a relationship of parent/child between the adopter and the adopted that is similar to the natural relationship ("habentur ut filii"). The case to be typified in this impediment is, then, canonized. That case is an adoptive relationship constituted according to the corresponding civil laws.

Although not expressly stated in c. 110, such a relationship is not limited to a relationship between adopter(s) and adopted. Indeed, when we relate c. 110 to c. 1094, we see that the relationship extends at least to all persons in the direct line and also to adoptive brothers and sisters, regardless of whether the adoption did nor did not cause a legal relationship under civil law.

The term adoption is to be understood in the strict sense. The impediment arises only from adoption, and not from similar relationships such as guardianship and fostering, as it became clear during the writing of the canon. Although the first versions proposed included guardianship as a source of the impediment,[1] in the end it was preferred to follow the traditional practice of the Latin Church, which had always limited the

1. Cf. *Comm.* 3 (1971), pp. 74–75; and 9 (1977), p. 368.

impediment to cases of strict adoption. Simple de facto adoptions are also not included in the concept.

For the impediment to arise and be validly constituted, all requisites must be precisely observed that are required by civil law (which coincides with traditional historical practice).[2] In Spain, the canonized norms are arts. 175–180 of the Civil Code in the version established by Act 21/1987 of 11 November, which includes the substantive aspects of adoption and its constitution; and arts. 1829ff of the Civil Procedure Act for procedural aspects.

Although the impediment depends upon civil law for its foundation and elements, the civil adoptive relationship, canon law is independent of civil law with reference to the nature and effects of the diriment impediment and its scope (lines and degrees affected). Thus in the direct line, since the degrees are not specified, all degrees must be included. Therefore, an adopter may not marry the person adopted; children of adopted persons may not marry the adopters, and an adopted person cannot marry the parents of the adopter. However, it appears that there is no impediment between the parents of the adopter and the descendants of the adopted person; since none of them is either adopter nor adopted, it cannot be said that there is any parental relationship "ex adoptione orta."[3]

In the collateral line the impediment arises between children of the adopter, regardless of whether or not they are legitimate, and the adopted person, meaning adoptive brothers and sisters. Some authors assert that this case also includes adoptive children with each other, if there are several of them and they are of different sexes.[4] Although such a case has not been considered to be in the tradition of this impediment,[5] the wording of the canon permits such an interpretation. With the new regulation, legal affinity is no longer a source of the impediment. It was always explicitly included until *CIC*/1917 was promulgated, when regulation of this impediment was made totally dependent upon civil law (cf. cc. 1059 and 1080 of *CIC*/1917).

The impediment comes from human law, as the SCHO clearly indicated[6] and thus may be dispensed. Since it is not among the impediments reserved to the Apostolic See in c. 178 § 2, it may be dispensed by the local ordinary. In countries where legal relationship is also a dispensable impediment to civil marriage, a simply civil dispensation does not eliminate

2. SCHO, Instr. to the Apostolic Vicar of Sophia (April 16, 1761), in *Collectanea SCPF*, I (Rome 1907), pp. 281–282.
3. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho matrimonial canónico* (Madrid 1991), p. 107.
4. Cf. B. BERSINI, *Il nuovo Diritto Canonico matrimoniale* (Turin 1985), p. 91; F. BOLOGNINI, *Lineamenti di Diritto Canonico* (Turin 1989), p. 275.
5. Cf. *Sacrorum Conciliorum nova et amplissima collectio*, LIII, ed. Mansi (reprinted: Graz 1961), col. 750.
6. Cf. SCHO, Instr. to the Apostolic Vicar of Sophia.., op. cit., p. 244.

the impediment under canon law since the impediment is formally canonical. However, normally both civil and ecclesiastical dispensations are required in both the countries where the system of obligatory civil marriage is used and in countries where a religious marriage has civil effects in so far as the marriage respects the conditions established by State law.

A problem that is not always easy to resolve can arise when the impediment is not civilly dispensable. If the State does not accept a canonical dispensation, the marriage cannot have civil effects. That is the case in Spain at the present time.

A canonical marriage entered into after dispensation from this impediment in the direct line would have no civil effects in Spain. According to art. 48 of the Civil Code, the impediment occurs only for the direct line and is not dispensable. In addition, according to art. 63, a registrar must refuse inscription if the ecclesiastical certificate or entries in the record indicate that the marriage does not meet the requirements for validity under the Civil Code. Since an adoption can be verified from data on an ecclesiastical marriage certificate and in the Civil Register, this marriage could not be registered and could therefore never have full civil effects. It could enjoy the benefits of a putative marriage only.

Furthermore, if for any reason inscription was successful, the public prosecution authority or even any person with a direct and lawful interest could sue under art. 74 for nullification of the marriage, since "regardless of the form of celebration" (cf. art. 73.2 of the Civil Code), marriages entered into by persons who incur in the impediments indicated in the corresponding articles (unless with dispensation, which is impossible in the case of legal relationship) would be null. Thus in this instance, to assist at the canonical marriage of persons trying to marry in Spain with a dispensation from this impediment in the direct line, permission from the local ordinary is required under c. 1071 § 1, 2° for cases when the marriage cannot be recognized or celebrated under civil law.

Nothing is established for the possible cessation of the impediment in cases where there is no longer an adoptive relationship. Traditionally, before *CIC*/1917 was promulgated, the impediment was perpetual in the direct line and for legal affinity. It was temporary, however, "durante adoptione" in case of legal fraternity. With *CIC*/1917, as we have said, the impediment became totally dependent upon civil law.

At present , in light of the canon's silence, it is possible to defend the position that, when the condition that constitutes the impediment (adoption) ceases or is eliminated, the impediment should also disappear. If c. 110 has the status or relationship of adoptive child depend upon civil law, when civil law strips the child of said status, the impediment would have to cease. It would not fall under the case of c. 1094, since that canon establishes that persons "cognatione legali ex adoptione orta ... coniuncti sunt" may not contract marriage, and in that case the legal relationship

would no longer exist. However, some authors[7] advocate that it is perpetual. They argue that when adoption and the relationship it originates are made to imitate natural or blood relationships ("adoptio imitatur naturam"), and since the impediments based on relationship (consanguinity, affinity and public propriety) are perpetual, then, logic would require that the legal relationship should also be perpetual.

7. Cf. M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado* (Madrid 1989), pp. 129–130; J. PÉREZ LLANTADA-C. MAGAZ SANGRO, *Derecho canónico matrimonial para juristas* (Madrid 1987) p. 152.

CAPUT IV
De consensu matrimoniali

CHAPTER IV
Matrimonial Consent

1095 **Sunt incapaces matrimonii contrahendi:**

1° qui sufficienti rationis usu carent;

2° qui laborant gravi defectu discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda;

3° qui ob causas naturae psychicae obligationes matrimonii essentiales assumere non valent.

The following are incapable of contracting marriage:

1° those who lack sufficient use of reason;

2° those who suffer from a grave lack of discretion of judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted;

3° those who because of causes of a psychological nature, are unable to assume the essential obligations of marriage.

SOURCES: 1°: SRR Decisio coram Julien, 30 iul. 1932 (*SRR Dec* 24 [1932] 364–382); SRR Decisio coram Grazioli, 1 iul. 1933 (*SRR Dec* 25 [1933] 403–419); SRR Decisio coram Wynen, 25 feb. 1943; SRR Decisio coram Canestri, 16 iul. 1943; SRR Decisio coram Heard, 4 dec. 1943 (*SRR Dec* 35 [1943] 885–903); SRR Decisio coram Felici, 22 maii 1956; SRR Decisio coram Felici, 3 dec. 1957; SRR Decisio coram Sabattani, 24 feb. 1961; SRR Decisio coram De Jorio, 18 dec. 1961; SRR Decisio coram Mattioli, 4 apr. 1966; SRR Decisio coram Pompedda, 3 iul. 1979

2°: SRR Decisio coram Wynen, 25 feb. 1941; SRR Decisio coram Wynen, 25 feb. 1943; SRR Decisio coram Felici, 3 dec. 1957; SRR Decisio coram Sabattani, 24 feb. 1961; SRR Decisio coram Pinto, 4 feb. 1974

3°: SRR Decisio coram Sabattani, 21 iun. 1957; SRR Decisio coram Pinna, 4 apr. 1963; SRR Decisio coram Anné, 17 ian. 1967; SRR Decisio coram Lefebvre, 2 dec. 1967 (*SRR Dec* 59 [1967] 803); SRR Decisio coram De Jorio, 20 dec. 1967 (*SRR Dec* 59 [1967] 869–879); SRR Decisio coram Anné, 2 feb. 1969; SRR Decisio coram Serrano, 3 apr. 1973; SRR Decisio coram Raad, 14 apr. 1975; SRR Decisio coram Pinto, 14 apr. 1975; SA Decisio coram Staffa, 29 nov. 1975; SRR Decisio coram Anné, 4 dec. 1975; SRR Decisio coram Lefebvre, 31 ian. 1976; SRR Decisio coram Serrano, 9 iul. 1976; SRR Decisio coram Pinto, 15 iul. 1977; SRR Decisio coram Masala, 10 maii 1978; SRR Decisio coram Huot, 7 iun. 1979; SRR Decisio coram Ferraro, 6 feb. 1979

CROSS REFERENCES: cc. 98, 99, 124, 219, 1055, 1057, 1058, 1061, 1083, 1084, 1096, 1101

COMMENTARY

Pedro-Juan Viladrich

1. *The three essential aspects of the voluntary act of marriage consent.*

Canon 1095 contemplates marriage consent as an act of free will proper to the contracting party. Since the object of this act of the will is the entire structure formed by the essential elements of marriage, this essential structure is also the point of reference that objectively measures the degree of freedom needed to establish marriage. Therefore, the specific type of free will required for a valid consent is that set by the constitutional structure of marriage itself, for this is what marriage consent must be apt to establish.

Since marriage implies acts, habits, and biographical co-identity of the spouses, the following three aspects of marriage and of its vital dynamism form the specific nature of free will necessary for valid marriage consent: capacity for eliciting the human act of wedlock, capacity for those acts and habits through which the partnership accomplishes its normal ordination to its ends, and capacity to convert the person into a spouse. These three aspects are essential to marriage consent because each affects the whole constitutive structure of marriage. Therefore, although they can be intellectually distinguished, all are in fact necessary and if only one is missing, the person's effective power to establish marriage is fatally deficient.

Firstly, marriage is not an epoch of a person's life which begins, develops and an end ends by certain genetic information, as is the case with the passage from childhood to puberty, from the start of youth to its loss, or from old age to death. No one is born married nor is marriage a fact that just happens, and no human power can turn a man and a woman into husband and wife except the contracting parties themselves. In this sense, then, it is part of the genius of canonical tradition to have emphasized that marriage at its origin belongs to the realm of freedom, that is to say, to the spouses' inviolable power of self-determination, so that marriage comes into existence not from our passive human synthesis, but from the person's active power to assert. Marriage can only originate from the contracting parties' free choice of each other and of this kind of specific union between a man and a woman. In this sense, marriage is identifiable as none other than the *very act which gives rise to it* and is valid only when formed from that original, non-repeatable, and one vital act of the spouses: the free and reciprocal act that establishes the couple's co-identity here and now. That is the consent or marriage *in fieri*.

In addition, marriage is, in its very essence, *a very* profound *human form of co-identity,* a very personal way of being founded on the power of union which the human sexual duality possesses. It is a free act, added to a person's life, by which the man is defined as "the one who belongs to his wife" and the woman is defined as "the one who belongs to her husband". In this sense, marriage is a biographical co-identity consisting of the common possession and sharing of the dual modality of human sexuality. This co-identity is exclusive (unity) and for life (indissolubility).

Lastly, marriage is a *common-life project* whose objective content is the joint pursuit of the conjugal good and the procreation and education of offspring. All this is progressively achieved by means of "acts that are recurrent with that continuity that characterises the exercise of permanent duties". That is to say, the ends of marriage are achieved by means of habits due in justice, which form the steadfast dynamism of the sort of life known as conjugal life, which expresses this ordination of marriage to those ends. Within this due ordination of married life to its objective ends, coordinated and in harmonized with them, the spouses pursue their own subjective ends, whether personal or common, by interweaving these objective and subjective ends to the unrepeatable co-biography of each couple.

That three-dimensional aspect of marriage (foundational choice, co-identity, and common-life project) is present in every essential act and form of conjugal behaviour. For example, the carnal union of the spouses is performed by a particular act; although it is a particular, discrete act, it expresses the spouses' fundamental identity, contains and materializes all the affective, rational, and voluntary levels of their interpersonal relationship, and is repeatable as conjugal behaviour consistently ordered to procreation and the conjugal good. Nourishing and protecting the common child is achieved by concrete and particular acts which cannot be

discontinuous, unusual, anomalous, gratuitous or casual. In fact, those acts form a reiterated and shared continuity or conjugal behaviour that reveals the meaning of both fatherhood and motherhood and forms the steadfast dynamism of married life. At the same time, through each act and habit of nourishing or protecting one's children, the common and deep co-identity of the parents as a married couple is also expressed. Many other examples could be offered.

Those three aspects of marriage c. 1095 call for the right ordering of conjugal life to the essential ends of marriage and correspond to three aspects of the specific freedom of consent which, in turn, are the source of the three criteria of measure of c. 1095. First, marriage consent is always a *human act,* that is, a free and rational act conscious of its specific nature; in the second place, this free, rational decision is *proportionate* to the reciprocal giving and accepting of the person's own masculinity or femininity as a mutual joining of a juridical nature; and, in the third place, it is a free, rational act *capable of undertaking,* here and now, those future conjugal acts and behaviours which, in terms of joint and reciprocal obligation, demand the right ordination of common life toward the achievement of its essential ends.

Canon 1095, 1° contemplates consent under the light of c. 1104 which regards it as a valid nuptial sign or expression that unifies, in one formal unity, the two internal acts of the will and manifests them to each other and *erga omnes*. Then, c. 1095, 2° considers consent from the point of view of each contracting party's internal act of the will and in light of c. 1057 § 2, which addresses the establishing of the matrimonial union. Finally c. 1095,3° regards consent, again from the same perspective of c. 1057 § 2, but as assuming the obligatory dynamism of the established union, that is to say, of the ordering of the conjugal future to its objective ends through those suitable acts and behaviours that are due between the spouses. In summary, the consensual capacity regulated by the text of c. 1095 gathers those three aspects of the specific voluntary nature of the one and only efficient consent which is based on three aspects of the substantial structure of the one and only marriage, namely, the *sign* establishing the bond, the production of its *essence,* and the assumption of its *dynamism* toward the objective ends.

2. *The legislator's aim is to define the capacity for consent and to formulate the juridical criteria for assessing defective capacity.*

The purpose of this canon is to regulate the effects of the psychic dysfunction in a marrying party's internal capacity to furnish valid matrimonial consent. The legislator is aware that psychic anomalies are very diverse in their nature, etiology, and intensity as they affect each person, to the point that each case presents a particular set of clinical symptoms and

diagnosis, and each case requires a particular assessment. The Law on marriage is not concerned with the definition of mental health or with the classification of emotional disorders and illnesses. The Law cares, however, about the definition and protection of the notion of valid consent. In this sense, the legislator's interest for the psychic anomaly derives from the fact that such psychic dysfunction can so seriously affect either or both of the intellectual and volitional psychosomatic functions as to render consent ineffective. The dysfunction of course, must be serious, but the ultimate question is not the degree of the dysfunction; rather, the focus must be on whether, in fact, the dysfunction vitiated the consent. Operating in harmonious conjunction, the intellectual and volitional faculties endow matrimonial consent with the degree of rationality and freedom needed for validity. Psychic anomalies are of interest to the jurist insofar as they can be the factual cause of a juridical effect—the lack of consensual capacity. The cause and effect relation between that *factual* cause and the *juridical effect* is not inevitable, for the latter does not necessarily follow from the existence of the psychic anomaly. The question at this point is: how to know the occurrence of that cause and effect relationship, and how to measure it juridically in order to define the absence of consensual capacity?

The legislator solves the problem, first, by intentionally distancing himself from the terminology or categories of clinical psychiatry and from the classification of psychopathologies in order to avoid any confusion between psychic anomaly and consensual incapacity. To that purpose, c. 1095 sets forth three criteria of essentially juridical character: the use of reason, the discretion of judgment, and the power to assume the essential conjugal duties. These three criteria contain a positive and a negative meaning. In the positive sense, by the formulation of the three criteria, c. 1095 defines the *specific consensual capacity needed for marriage*. In the negative sense, under the same formulation of three defects in the person's psychological powers, the three criteria measure the possible modalities of the "specific" lack of rationality and freedom required for valid consent. In this way, then, c. 1095 defines the only three ways by which the fact of a psychological anomaly, whatever it may be, can cause the invalidating juridical effect (which is the defect of capacity for marriage consent or consensual incapacity), namely, by depriving the subject of sufficient use of reason, inflicting a serious defect of discretion of judgment, or disabling the person from the ability to assume the essential duties of marriage. Lastly, since each of those criteria, viewed in the positive sense, denotes an essential aspect of the inseparable and specific freedom associated with the act—which is one, unified voluntary act, each, when looked at in the negative sense (i.e., where one or more of these psychological powers is fatally defective), vitiates the *whole* free consent itself (not just a "part of it"). For this reason, each normative criterion of c. 1095 is an individual *caput nullitatis*, capable in itself of rendering invalid the one act of marriage consent.

One could wonder why the legislator has not opted for directly and positively defining consensual capacity in the text of c. 1095 leaving it to canonical doctrine and jurisprudence to interpret the defect or absence of capacity from the very varied and specific possibilities of incapacity in each particular case. This seemingly simpler option is less clear if we take into account that in cc. 1055 and 1057 the legislator defines marriage and consent in positive terms and, from c. 1096 onwards, the legislator formulates the defects and the vices (i.e., ignorance, the different errors of fact and of law, and the exclusions implied in simulation, condition, violence, and fear) in the most precise and systematic way possible by following the traditional technique. In this manner, cc. 1095 at 1104 complete, through the *via negativa*, the prescriptions of cc. 1055 and 1057.

In any case, it is indispensable for the interpreter to notice that within c. 1095 there is a positive notion of consensual capacity that should always be used in our exegesis. By so doing, one can better see the connection among the norms of cc. 1095 and 1104 and those of c. 1057, which is the key to the voluntary nature of consent, and of c. 1055, which is crucial to determine accurately the object of the act of consenting, or marriage described in its essential structure, that is to say, by its causes, essence, properties and ends. In this sense, c. 1095 completes the other norms and adds key points concerning the type of *specific* freedom required by the essential elements that structure marriage and, more specifically, by the act that establishes the bond and its properties and by the dynamic ordering of marriage to its objective ends. By this following approach, c. 1095 defines in a normative fashion the *inner content of consensual capacity.*

3. *Notion of consensual capacity*

In light of cc. 1104, 1055 and 1057, we can say that consensual capacity consists of that degree of possession of self and of one's own acts needed to furnish the act of contracting marriage with the freedom and rationality required for the reciprocal donation and acceptance of self, as man or woman, to constitute a lifelong partnership ordered to the conjugal good and the procreation and education of offspring. To this, c. 1095 adds that for a person to be capable of such specific freedom of will, the following is needed: sufficient *use of reason* for the human act of wedlock, *discretion of judgment* on the conjugal rights and duties that are given and accepted at the moment of establishing the married bond, and *ability to assume*, as juridical duties, the conjugal acts and behaviours required by the vital dynamism of the partnership as it progresses toward its objective ends along the whole existence of the marriage. Use of reason, discretion of judgment and power to assume form the specific voluntary nature of marriage consent and define the content of consensual capacity. The person who possesses those powers is capable and the consent given under them is a valid consent.

4. *Lack of sufficient use of reason*

a) *Positive and negative meaning*

In its positive meaning, the legal criterion of "sufficient use of reason" means that the act of contracting or giving consent must be, above all, a *human act*. The legislator wants to point out that the most fundamental and first aspect of consensual capacity means that *the contracting party should possess that degree of free and rational wilfulness needed for the act of contracting to be, here and now, a human act.* The object of the "sufficient use of reason" required by c. 1095,1° is, therefore, the act of contracting as c. 1104 defines it. This act of giving consent, which is an "act of giving or of contracting", should enjoy the quality of being a human act, and for this reason, the possession of the adequate—"sufficient"—use of reason is necessary.

In the negative meaning, in which the *modus dicendi* of the legal text is written, a person lacks sufficient use of reason who, for whatever cause, does not have, at the moment of giving consent, that integrated and harmonious mastery of his or her sensible, appetitive, intellectual and volitional faculties required for the act of contracting to be a human act. Canonical tradition understands as "human act" the act which, endowed with free rational will, is characteristic of the human person. A human act is, therefore, an act mastered by its author by means of reason and will: this rational and voluntary *dominion over one's acts* is the essential element of the human act. Being master of one's personal acts by means of one's rational understanding (through which the person knows the act) and one's free will (through which the person wants it), has inspired the best definition of the voluntary human act as "the act which, coming from one's personal intrinsic principle, the same person originates it in and by himself, that is to say, by his own free will and with sufficiently true knowledge of the end pursued". Since the act of contracting should possess the essential notes of the human act, the first consideration should refer, even before assessing the proportionality of the consenting act to marriage, to the contracting party's possession of the psychic prerequisites to generate, in himself and by himself, an act of free will with knowledge of its end. These psychic prerequisites comprise both organic and not organic or spiritual functions, whose harmoniously integrated operations permit the acts proper to the superior intellective and volitive functions and, finally, they allow the person to act with full awareness of reason and freedom of the will at the moment of contracting. Otherwise, without such awareness or freedom, a person lacks the "sufficient use of reason" to furnish the act of contracting of c. 1104 with the quality of human act.

b) *Meaning of the term "use of reason"*

Within the context of c. 1095 which seeks to specify the aspects of freedom and rationality regnant in the capacity for matrimonial consent, the expression "use of reason" in 1° has a strict juridical meaning The

term "reason" is not limited to refer only to the intellect, as that faculty whose object is to know the truth. Neither can the juridical meaning of "reason" be reduced to the speculative function of the intellect, understanding that the use of practical reason given in marriage, including its judgmental function, determines, at the same time, the field of the grave defect of the discretion of judgment of canon 1095,2°. This limited interpretation ensues three difficulties:

In the first place, the entire c. 1095 refers to the person's ability or inability to endow consent with *voluntariness* and, in this sense, c. 1095 is directly related to canon 1057 § 2, not to c. 1096 What matters at the end is the act of the will, whereas the intellect is of interest only insofar as it is not capable of its own operation, not because of ignorance or error but due to a dysfunction of the psychic faculties to furnish the will a sufficient knowledge of the object. Since the sufficient freedom of consent is, ultimately, the object of all the legal rules on consensual incapacity, it would make no sense to interpret the terms "reason" or "judgment" of c. 1095,1° and 2°, as if referring only to the intellectual functions, whether theoretical or practical, and not at all to the will.

In the second place, if 1° of c. 1095 should only refer to the theoretical judgment and 2° to the practical reason and not the act of will in c. 1057 § 2, then 3° of c. 1095 would only refer to a defect of voluntariness of consent, which is the impossibility of assuming obligations. If that was the case, c. 1095 would fail to regulate some essential aspects of free and rational consent such as the act of consent itself as well as the act of giving and accepting the rights and duties that constitute the content of the marriage bond It is clear that the ability to assume the duties, even if essential to the capacity for consent, is not the only aspect of that capacity, and the whole voluntary nature of a valid consent is not restricted, therefore, to the ability to assume.

In third place, a large interpretative gap would be open in that specific aspect of the voluntariness of consent that consists of being one single act by which two internal wills are exteriorly manifested, or act of contracting with the requirements for validity of c. 1104. Since no human act is an act of the intellect only, *the expression "use of reason" comprises the entire sequence of motivation, deliberation, decision, and execution, with the necessary and harmonious concourse of practical reason and the will, by which the manifestation of consent, as required for validity by c. 1104, is qualified as a human act.*

c) *The measure of insufficiency*

The three criteria or rules of c. 1095 contain a *measure*, or express the judgment of *prudentia iuris*, to allow an assessment of the defect of capacity. For the "use of reason" the measure of prudence is "sufficient," for the "discretion of judgment" the measure is "grave," and for the "assuming the essential duties" the measure is "not able" (*non valent*). Concerning the first, what does "sufficient" mean in relation to the "use of

reason"? It means, first of all, a complete absence of the use of reason, for it is certain that those persons who totally lack the use of reason are incapable of marriage consent. Apart from this obvious meaning, for which no *measure* need be applied since there is not any "use of reason," in the term "sufficient," three rules should be taken into account:

First rule: a contracting party may have a certain use of reason which is still insufficient to place a valid act of contracting as, for example, with certain degrees of mental retardation or Down's syndrome.

Second rule: a person can suffer from a deficiency of the use of reason but still have it in a sufficient degree as to be capable of the rational and voluntary act of giving consent, that is, of performing the nuptial sign. Canon 1095 does not require a full use of reason without defect or deficiency. A certain degree of present inadequacy is compatible with the possession of consensual capacity, as in the case of many light to moderate depressive states, certain degrees of alcoholic euphoria, and other similar disturbances among which those episodes of intense emotional fluctuation so typical of the time of the wedding deserve particular mention.

Third rule: the legislator requires a sufficiency measured by the quality of human act that the *nuptial sign* must have as the act of giving consent according to c. 1104. The interpreter must take into account that the legislator establishes a measure for the *matrimonial character*: in effect, that which must be a human act is precisely the act of contracting marriage, inasmuch as it is a nuptial sign or an act which manifests consent. As such, then, it is a measure of the sufficiency required by 1° of c. 1095, just as there is a measure, and an explicit one, for the discretion of judgment in 2°, namely "the rights and duties to be given and accepted," and another for the ability to assume of 3°, which is "the essential duties of marriage". This means that the rule of 1° is not simply that degree of use of reason that a person acquires by the seventh year of age, but the degree needed to know and to want the nuptial act, that is, the wedding. The text and fabric of c. 1095 in its entirety seeks to determine the essential and specific consensual capacity for marriage and to regulate its defect. Canon 1095 is not a mere repetition of c. 124, which governs the capacity to realize a juridical act in general; rather, all of the criteria of c. 1095, including that of 1° therein, measures specifically with respect to matrimonial capacity.

d) *The inadequacy of the use of reason "in actu" (i.e., at the immediate time of communicating matrimonial consent) under c. 1095, 1°, and the proportionality of the psychic cause*

What has been said in the previous paragraphs explains the legislator's consistency in not mentioning any particular dysfunction or psychic anomaly in the text of c. 1095, 1° which would have legally linked the origin of the insufficiency of the use of reason to mental illness or to a specific psychic disorder. This intentional lack of *legal* nexus allows the inclusion of a great variety of factual situations within the criterion of

c. 1095, 1°: from severe mental retardation and some disorders of both personality and behaviour, due to serious brain lesions, to serious alcoholic intoxication, at the moment of contracting, by an ordinarily abstemious person free from any dependence or dysfunction derived from habitual alcoholic consumption.

In that sense, the interpreter should not make the mistake of thinking that 1° of c. 1095 regulates only those mental illnesses that are so serious as to normally deprive the subject from the use of reason or inflict an extreme deficit on it. Rather, those and other dysfunctions are regarded in *the canon as situations of fact that can deprive the contracting party from* the sufficient use of reason needed for a valid act of contracting, but they are not the only dysfunction or the only set of circumstances that can produce the same effect. What is important is to assess whether or not the person had, at the precise moment of contracting, the use of reason needed to perform the act of contracting as a human act. If at that moment, the person did not have that degree of the use of reason, consent is null because of incapacity. And this is so independently from the situation of fact that may have caused the contracting party's legal insufficiency and apart from the fact that the cause of the deficit, concurrent with the act of contracting, may be termed a psychopathology by the more authoritative manuals that describe, classify, or diagnose mental and behavioural disorders, whether congenital or acquired, chronic or sporadic. From the canonical point of view, therefore, the insufficient use of reason is an incapacity *at the moment* of contracting, even though the psychic dysfunction that provoked it might had been chronic, and even congenital, from the medical point of view. Logically, the person who suffers a chronic deficit of the use of reason, also suffers it at the moment of contracting. The opposite, however, is not true because a momentary deficit can exist in a person who habitually enjoys sufficient use of reason.

The psychic cause that explains the insufficient use of reason should exist and be of such nature as to explain the cause and the proportion of that insufficiency because that deficit of intellectual and volitional powers for the human act is not the habitual and normal state of a person's operations of the superior faculties. Proving the causal relationship between the psychic fact and the insufficient use of reason at the *immediate moment* of contracting is the essential "key" to clarifying the test of the *measurement* which is set by each of the grounds of nullity in c. 1095. However, the psychic fact is not, strictly speaking, the immediate cause of the nullity of marriage, but only the fact that explains "the lack of sufficient use of reason" of c. 1095, 1°. Any situation of fact, then, that may provoke the insufficient use of reason *at the moment of contracting* can be included under 1° of c. 1095 so that the cause of the nullity of marriage can be invoked when the psychic condition is the factual situation causing the inadequacy of the use of reason *in the act* of contracting. That would occur, for example, in current states of acute inebriation, of acute intoxication occasioned by psychotropic substances or overdoses of medicines, of

somnambulism, of hypnosis, or in acute episodes of schizophrenic, psychotic, delirious, manic-depressive disorders, or other similar types of disturbances actually present at the time of contracting consent.

5. *The grave lack of discretion of judgment*

a) *Traditional notion and current meaning of the term in the context of c. 1095, 2°.*

The legislator uses in 2° of c. 1095 an expression, "discretion of judgment," with a long canonical tradition in regards to capacity. The new use of the term is, however, more exact when compared with the more generic and less precise meaning used in the past. In the present context of the canon, discretion of judgment no longer refers to every aspect of rational, free consent, but to one very specific only. On the premise that the contracting party is by nature able to know and to want the nuptial sign, the legislator directs his attention, in 2° of c. 1095, to the essential object of the internal act of the will as defined by c. 1057 § 2. This object is the mutual giving and accepting of the man, in his manhood, and of the woman, in her womanhood, in a juridically bonded union.

Therefore, the aspect of voluntariness of consent that concerns 2° of c. 1095 is its proportionality to the aim of establishing a specific marital union between this man and this woman. In terms of capacity, it consists of the persons' true, minimal knowledge of the meaning of their own masculinity or femininity as those aspects of self that can be reciprocally given and accepted, and of the same persons' power of their wills to actually give themselves, each one to the other, as man or woman, and to accept the other as one's own man and one's own woman.

We can now define discretion of judgment as that *measure of maturity, of a person's free and rational mastery of oneself and one's own acts, needed for the man to give himself, as man, to the woman and to accept her as a woman, and for the woman to give herself, as woman, to the man and accept him as a man, and thus establish a union among themselves to which they are reciprocally and jointly entitled and obligated in justice.* Without that degree of self-mastery and control over one's masculine or feminine behaviour, a person cannot give the conjugal rights over oneself, which are his or her own duties, nor accept the conjugal duties of the other, which are her or his own rights, and the Law, therefore, cannot effectively recognise those same rights and duties.

b) *A specific proportionality*

Nobody is born with the maturity required for marriage because the human person acquires the capacity to know and to will progressively, with respect to those matters of life which carry moral implications as well as, more specifically, sexual and conjugal matters; and a person

comes into the full possession of his or her sexual modality, with its potential for the gift and acceptance of self in marriage, as the result of a process of growth that, in general terms, is presumed to be completed after puberty. In this sense, the degree of psychological capacity implied in the term "discretion of judgment," which entails the integrated and harmonious maturation of the human development processes, is higher than the minimal discernment of good and evil needed for someone to be the subject of moral imputability. The latter capacity is acquired before the discernment for marriage, since it is evident that a person can act morally before attaining puberty. For this reason, St. Thomas Aquinas emphasized that for one to be capable of assuming obligations about his or her future conduct or duties that are for life, as in the case of marriage, a greater use of reason is required than for the voluntariness of a moral act. Receiving and further developing Aquinas' proposition, canonists have traditionally used the expression "discretion of judgment" to include the following three ideas:

First, in the specific context of the canon, *discretion* of judgment means, in the first place, the specific degree of maturity needed for conjugal matters or, in other words, the *suitable proportionality* that must exist between the contracting party's capacity to know and to will and the marital rights and duties actually known and willed, so that the person contracting may be said to be a *discerning* person concerning those rights and duties. In the second place, the term "judgment" means the act of practical reason presenting a particular choice to the will. It consists of a complex but most significant moment in a human person's process of rational self-determination. This is the moment when practical reason, having deliberated with sufficient true knowledge and freedom about a particular choice, presents a practical judgment to the will which moved, then in turn, by its own power of self-determination opts for the object of choice and appropriates it. The term *judgment*, then, implies not only the power of the human mind through practical reason to know, deliberate about, and suggest to the will the possible option of a particular marriage, but also implies the capacity of the person to make, as his or her own act, the choice in favor of that particular marriage. In the third place, to have the *discretion of judgment* entails the natural vital process of both intellectual and volitional maturation which, attaining *self-mastery* over oneself and one's actions, is *endowed with certain permanence*; that is to say, it is not acquired today and lost tomorrow.

c) *A state of maturity in a person's biography*

At the moment of giving consent, a contracting party should have both "sufficient use of reason" of no. 1 and "discretion of judgment" of no. 2 in order to know sufficiently and want the nuptial sign, at that very moment, as a manifestation of his or her consent, and be able to understand and choose the marital rights and duties, to be internally given and accepted by both parties, and thus be bound in marriage here and now.

The one criterion of "use of reason" and the other of "discretion of judgment" coincide when the bridegroom/bride, at the moment of giving consent, has sufficient use of reason to understand and want the very nuptial sign as the consensual manifestation, and, at the same time, has a proportionate discretion of judgment to understand internally and desire those conjugal rights and duties which he/she gives and accepts as binding in marriage here and now. However, "use of reason" and "discretion of judgment" address different aspects of the same object of consent, and those aspects, in turn, differentiate and juridically assess or measure the actual exercise of reason and judgment. Specifically, the act of expressing the nuptial sign, or act of manifesting consent as defined in c. 1104, requires that an alleged "lack of sufficient use of reason" be assessed at the moment of contracting, even though the factual situation causing the deficiency may be a chronic, even congenital, dysfunction. As we have seen, c. 1095,1° can be invoked for those non-chronic deficiencies which can temporarily deprive the contracting party of sufficient use of reason in *actu contrahendi*. This, however, is not the case when assessing or measuring the "serious defect of discretion of judgment," for discretion of judgment is a state of maturity in a person's life, and a person can be momentarily deprived, at the moment of contracting, of sufficient use of reason concerning the voluntariness of the nuptial sign while having habitually attained the normal state of maturity implied in the discretion of judgment concerning marriage; or a person can enjoy sufficient use of reason to know and to want the nuptial sign but lack the maturity (the internal possession of self and of one's acts) that is commensurate with the conjugal rights and duties to be given and received, at that moment, in order to establish the matrimonial bond; or a person, may, finally, lack sufficient use of reason and labour, at the same time, under a serious defect of discretion of judgment due to either diverse or the same set of facts and psychic anomalies. In sum, although a person must possess the needed discretion of judgment at the moment of consent, *for its juridical assessment, the condition of normalcy or of grave defect of discretion of judgment must be biographical.*

d) *The measure of the "grave lack" of discretion of judgment*

Another novelty of c. 1095,2°, in contrast with the traditional interpretation of "discretion of judgment," refers to the measurement of the "grave lack". It was not uncommon among many authors in the past to understand "discretion of judgment" in terms of the deliberation that forms the human act, even emphasising the need of an estimative maturity in the act of deliberation; in spite of the will's intervention through the successive phases of the estimative action, the deliberative process would basically be, according to that explanation, a strictly intellectual function. In this over-intellectual interpretation, the criterion to measure the "discretion of judgment" would also be an intellectual measure, namely, the possession of that minimum knowledge of marriage that differentiates

ignorance from substantial error or, in other words, the rule of the intellectual minimum contained today in c. 1096. From this perspective, a person was "ignorant" who, even if habitually capable to know, *did not know* that marriage is a permanent partnership between a man and a woman ordered to the procreation of offspring by means of a certain sexual cooperation; consequently, the defect of discretion of judgment would be "grave" only when the person did not, in fact, know that minimal notion of marriage because of *not being able* to know it.

Modifying this over-intellectual interpretation of the grave defect from the perspective of "ignorance," c. 1095, 2° explicitly mentions "the essential matrimonial rights and obligations to be mutually given and accepted". It follows that "discretion of judgment" includes, not only the operation of the practical intellect with its deliberative and estimative function, but also the will, for conjugal duties and rights are the object of both the intellect and the will. The text of the canon does not mention the rights and duties as mere objects of the intellect but as objects of the voluntary act of giving and accepting, that is to say, of the juridical act (which is an act of the will) of effectively establishing them. From the text of the canon, it also follows that c. 1095, 2° establishes an explicit measure, both *legal and objective*, to assess the gravity of the defect of discretion of judgment. This measure is made up of the essential conjugal rights and duties to be given and accepted, and its gravity is to be understood juridically because it has to do with juridical values. In other words, in the canon, the term "grave" does not refer to the seriousness of the psychic dysfunction or disorder of personality and behaviour, for these are medical diagnostic categories and situations of fact which, more or less, may clarify the juridical condition but are not to be confused with it. The term "grave" is, rather, the juridical qualification of the inability to discern with the intellect and to implement with the will the act of *setting up or establishing* the conjugal bond from which originate, in a second logical moment, the conjugal rights and duties.

e) *Essential rights and duties that arise from the establishment of the marriage bond*

It is fundamental, then, to define those essential rights and duties of marriage that, according to c. 1095,2° must be given and accepted (i.e., established) and, according to no. 3, must be assumed (made one's own through life as obligations of marital behaviour due in justice). The legislator has chosen not to commit those rights and duties to a legal formulation and has left it to canonical doctrine and jurisprudence to progressively declare and explain their content and limits. On their part, canonical doctrine and jurisprudence count with the texts of the canons that define consent, the partnership of conjugal life, and its properties and essential ends. Among many others, the texts of cc. 1055, 1056, 1057 and 1061 ought to be mentioned.

For the sake of the interpretation of c. 1095,2° and 3° we will simply enumerate those essential rights and duties as correlated, in the sense that to each essential right corresponds an equally essential duty. These are the following: *the right/duty to sexual acts, the right/duty to not impede procreation, the right/duty of establishing, preserving, and ordering the intimate conjugal partnership toward its objective ends; the right/duty of fidelity; the right/duty of mutual help in ordering towards the pursuit of the essential ends of marriage those acts and types of behaviour that are apt and needed for that purpose; the right/duty to welcome and care for the common children within the married community; and the right/duty of educating the common children.* (For the foundation, content, nature and limits of those essential rights and duties, see commentary to c. 1101, no. 6).

It is very important not to forget that, in so far as those rights and duties express the nature of the married bond, they *are equally held as mutual or reciprocal by the spouses and are to be exercised jointly* without any constituent discrimination, for those rights and duties express the oneness of the conjugal bond, which is not a double bond but one bond equally binding to both husband and wife. The joint exercise of those rights and duties admits *diversity of modes, adaptations, and apportionment of functions* which, given the special circumstances of the couple, can be agreed upon for the pursuit of the parties' *own objective ordination* to the essential ends. And as an expression of the unity and indissolubility of the bond, the essential rights and duties are *permanent, exclusive* and *unrenounceble* and should be included within the person's consensual capacity to establish and assume them with those characteristics.

It is not idle to remember that the psychic capacity needed to discern the essential rights and duties of marriage with the intellect and to establish them with the will—at least with the necessary *forma mentis*—can never be mistaken with a capacity for academic discourse on such rights and duties as done in these pages. The psychological capacity for matrimonial consent is a natural fact different from scientific conceptual thought, doctrine, jurisprudence, or from literary or expert expression. A person's consensual capacity for marriage is not an elitist capacity that can be measured by the conceptual parameters and expressive resources of a specialist. Rather, what needs be examined in each case is whether or not the man or the woman understand, by means of ordinary speech and behaviour, that when they marry, they *freely become one for the other*, for this form of being united to each other is what, in the expert's language, is called the marriage bond, from which the essential rights and duties emanate. The marriage bond that an expert establishes when he marries is not better than the bond of the person who does not understand the *concept* of juridical bond but *understands and wants to be united to the other person*, regardless of the rudimentary or culturally sophisticated form of expressing the nature of that voluntary action.

6. *Impossibility to assume, by reason of psychic causes, the essential obligations of marriage*

a) *Positive and negative meanings*

Marriage is established at a particular moment from which it begins to unfold and blossom as a vital and dynamic project carried out in common throughout the spouses' lives. From this perspective, marriage is a co-biographical dynamic realized throughout the joint lives of the spouses, even though it has a foundational, constitutive root. The formulation of c. 1095,3° is centred on this dynamic aspect of married life, or marriage *in facto esse*, and contemplates all its future development while being *assumed, at the foundational moment, as a juridical obligation* or commitment extending into the future, which is due in justice between the spouses.

In its positive meaning, the possibility of assuming the essential marital obligations of marriage contemplates that the person has sufficient self-mastery as to enable him to take responsibility (in terms of juridical obligations) for future acts and types of behaviour that are essential for the vital ordination of the marital partnership toward its objective ends, and about which the spouses have committed themselves at the moment of marrying. In the negative sense, a person is said to be incapable who lacks that mastery of self and of his or her acts needed to make a commitment, at the moment of establishing marriage, to a conjugal future in terms of obligations due in justice. "Committing oneself to that married future in the sense of taking it on as a matter of debt," so to speak, means assuming, here and now, the juridical obligation to those forms of future behaviour that are apt and necessary to pursue the objective ends of marriage. This ordination is nothing else but the marriage bond itself seen in its dynamic dimension. Therefore, that future ordination is said to be juridical, or "due in justice," because it consists of the dynamics of the future of the bond of marriage itself from which derive duties due in justice between the spouses.

b) *Meaning of "assume"*

The legal text uses the verb *to assume* (*assumere*). Its precise meaning refers to that aspect of the voluntary act (for such is the efficient consent defined in c. 1057,2°) implying both anticipation and commitment. By anticipation we mean the power of bringing within the foresight of the present act of reason those future acts and forms of behaviour ordered by the marital union to its own objective end throughout life; by committing we mean the power of freely obligating oneself, here and now at the moment of contracting, to carry out those future acts and conduct in the pursuit of the same ends, as required by the dynamism of married life. A person's capacity to assume presupposes, on the part of the practical intellect, a sufficient habitual degree of rational perception in order to recognise that marriage *in facto esse* is a common life project whose future

conjugal acts, conduct, and behaviour can be understood in advance because they are defined by marriage's ordination to those clear and objective ends that are the conjugal good and the procreation and education of offspring. On the part of the will, the capacity to assume requires the person's habitual mastery of self and of his or her conjugal behaviour so as to convert the attempt to effectuate those acts and conduct into a juridical obligation or duty owed to the other spouse, as a matter of debt because it belongs to the other as his or her own.

Having defined the act of *assuming*, one can understand the ambiguity of such other terms as "to fulfil" or "to carry out" that are sometimes used to translate the verb *assumere* of c. 1095,3°. The interpretive technique that should be used in this matter is the same to what has been employed to differentiate between the ends of marriage in their beginning and in their effects, that is to say, from the constitutive beginning of their dynamics or in the effective attainment of their result, in the sense that they are *ordained toward* or an *obtained result*. "To assume," then, makes reference to the habitual capacity of the intellect and of the will to constitute the ordination of the ends of marriage as an interplay that is obligated in justice. In a way, it signifies the obligation to effectively attain the results of the dynamics of marriage toward its ends. For this reason, then, if terms such as "to fulfil" or "to carry out" the essential duties of marriage were to mean that a person is incapable of consenting to marriage when the person does not, in fact, fulfil the conjugal duties throughout the marriage *in facto esse*, we would be faced with untenable contradictions in the canonical understanding of marriage and of its regulation. Having failed to observe fidelity, for instance, is not the same as having excluded it at the moment of contracting, for the exclusion of c. 1101 does not mean a mere *de facto* non-fulfilment of that duty during the time of marital life, since this is called adultery; it rather means, as interpreted by canonical doctrine, that the contracting party has excluded the right to fidelity at the moment of contracting. If "to assume" were interpreted as "to fulfil" or "to implement" the essential marital obligation of fidelity, the possibility of a declaration of nullity under c. 1095,3° would indeed be open. Many other similar absurdities could be used as examples.

c) *The measure of "impossibility"*

Now we must discuss the meaning of *impossibility* to assume. The action of assuming is a joint action of a person's intellect and will under the general principle that no one can be bound, or bind himself, to something impossible. This is stated in the maxims, "nemo obligare se potest ad id quod non est in sua potestate" and "nemo ad impossibilia tenetur". This is not a metaphysical impossibility but one of the moral order which, in the topic under discussion, refers to a person's inability *to acquire, here and now, obligations* to those marital acts and forms of behaviour that *surpass the person's habitual power of self-government concerning the projection into the future of obligations binding him and his acts*. The

possibility of doing so means, on the other hand, that the person has that degree of self-mastery required to commit himself and his future conduct, here and now, with an obligation due in justice, even though may not necessarily fulfil that duty or that conduct in actual fact.

While "to fulfil" or "to carry out" are equivocal terms, "to assume" means a free and rational act exercised at the present moment. Through this present act, the future is in potency anticipated and the person commits his or her intention to bring this potency into act, thus becoming permanently bound in justice. In this sense, then, the anticipation of future conjugal life and of the consequent juridical duty to attempt to pursue the objective ends of married life (through acts and forms of behaviour that are both apt and necessary) must derive from a *real, habitual power of rational foresight regarding this potency and a real intention to obligate oneself.* By "real" we mean that a person "assumes" the objective conjugal future (even though in potency only) by means of the normal and habitual maturity of intellect and not, however, through a false or unreal perception of that future (utopic dreams, fantasies, extravagant hopes, and other such fabrications not in accordance with logic and common sense, which have nothing to do with married life). Nor can a person assume the marital duties through some subjective life projects that are contrary to the dynamic ordination of marriage to its objective ends. From the viewpoint of the person's habitual possession of volitional maturity, the act of "assuming" cannot coexist with an impossible obligatory intent, for this would imply the lack of the self mastery needed to make a juridical commitment to the correct conjugal order of his future acts and forms of conduct. In order to judge the person's capacity "to assume," it will be necessary to examine especially the person's joint and harmonious operations of intellect and will and his/her antecedent biography in daily family, social, and professional life, mainly at a time free from the suspicion (*tempore non suspecto*) of feigned behaviour, all of which constitutes an assessment of the person's perceptive, emotional and affective potential vis-à-vis reality. This will entail the evaluation of a variety of factors, such as his or her control of aggressiveness and his or her capacity to project and to persevere in the real pursuit of the spousal goods and the goods of fatherhood and motherhood, to sustain the family, to contribute to life in common, and to educate the children. In summary, one must examine if, in the particular context of the person's habitual possession of volitional maturity, those acts and conduct essentially needed to order the person's life to the ends of marriage were, from the moment of giving consent, a *real possibility* and not an impossible project.

A person's impossibility to assume is measured by the essential duties of marriage, already mentioned in our discussion on discretion of judgment, which measure also the specific juridical *gravity* of such lack of capacity. The reason why c. 1095,3° refers to the duties but not the rights (even though they are correlative) is due to the special aspect of

consent and the capacity to give it implied in the formulation of no. 3 in which marriage *in facto esse* is seen as a common life project ordered to some specific ends. From the perspective of the act of contracting, which is an act of the present moment "projected" toward future obligations, what needs be examined is not so much the establishment of the bond (which would require the mention of the rights besides the duties), but whether or not the contracting party is able to bind *here and now* his future conjugal life, at the moment of consenting. Wishing, then, to emphasise that obligatory aspect of the future, the legislator explicitly mentions the duties but since those duties are correlative to the rights, the capacity to oblige oneself to the future implies *a fortiori* the capacity to receive faculties or rights. By mentioning the duties only, the special nature of the assuming act, as a present act of taking upon oneself an obligatory form which projects into the future, is underlined. In summary, by means of the duties, the legislator defines the manner in which the future is anticipated in the present act of *assuming*, namely, by converting into a juridical duty, from the moment of consent, the permanent ordination of the spouses' conduct to the objective ends of marriage.

d) *Impossibility versus "difficulty"*

The impossibility to assume at the moment *in fieri* should essentially be antecedent to consent and protracted, that is to say, non-momentary or transient. It is very important to distinguish, therefore, between *impossibility* to assume, at the moment of marriage consent, and other situations which do not constitute cases of nullity, such as situations of *difficulty* in fulfilling essential obligations throughout the vicissitudes of matrimonial life, or marriage *in facto esse*. From a theoretical viewpoint, it is not difficult to understand and differentiate those two predicaments, as it is evident that a marriage contracted validly can suffer misfortunes and difficulties, even some very arduous ones. Serious deterioration of common conjugal life and of communication between the spouses may indeed happen, and they can reach extremes that can generate, by reaction, psychological disturbances and barriers, and even pathological dysfunctions which can affect, in the long run, the spouses' self-mastery and cause a psychic impossibility to fulfil the essential marital duties. However, such failure in marital common life is not to be confused with either the serious defect of discretion of judgment or the impossibility to assume the essential duties at the moment of contracting marriage. Canonical *separation* of the spouses is a clear indication of a failed marriage that continues, nevertheless, to be a valid marriage. Only in actual practice, the distinction between impossibility and difficulty can become unclear when the facts supporting the impossibility to assume appear, with all the signs of a true defect of capacity, only when the person comes to face, during the marriage *in facto esse*, with the duties previously assumed. Sooner or later the spouses come to face the burdens accompanying the birth, care, and sustenance of the children, the other spouse's

illness, or simply the need to adjust each one's habits and preferences to the new demands of married life. In such cases, the antecedent origin of the impossibility to assume should be shown by demonstrating that the "causes" of psychic nature preceded consent and did cause the defect of self-mastery, and consequent incapacity to take up the future obligations, even though "the effects" of such incapacity did not arise until the demands of matrimonial life made their appearance. The actual facts of non-fulfilment of the essential duties can, then, be examined in order to discover if, notwithstanding their first appearance during marriage *in facto esse*, they are of a nature which must necessarily have an antecedent explanation. However, if the facts did not precede consent, there cannot be a defect of capacity to assume and, in consequence, the presumption of difficulty or of posterior impossibility prevail, but these are not causes of nullity.

e) *Error and "inopportune choice"*

The impossibility to assume must, in addition, not be confused with those unhappy consequences of married life caused by the *inopportune or imprudent choice* of a spouse. Except for cases of "error about the person," "error about a person's quality directly and principally intended," and "deceit" or fraud (see commentaries to cc. 1097 and 1098), an imprudent or less than opportune choice is still a free choice. An unfortunate, imprudent, precipitate or, for various reasons, unsuitable choice of partner, even if preceded by the relatives' forewarning, or any other such mistaken decision, never constitutes a cause of nullity for the basic reason that mutual understanding, affinity, well-being, and feelings of happiness are not of the essence, the properties, or the objective ends of a valid marriage. There is no doubt that those personal conditions are the contracting parties' most frequent and important subjective ends, which, just because of this, shows also that the choice of spouse is a most personal and free act.

f) *Habitual character of the antecedent anomaly*

Now we should add that both the impossibility to assume and the serious defect of discretion of judgment cannot be instantaneous occurrences, unlike cases wherein there is the lack of sufficient use of reason. Apart from the etiology and prognosis of the psychic causes of those deficiencies, the serious defect of discretion and the impossibility to assume are, as causes of nullity, psychological deficiencies of certain duration and permanence: nobody acquires in one day the maturity to establish the bond and to commit oneself to future obligations as a spouse and then retains it only for the time it takes to perform the nuptial sign, only to lose it an instant later. Rather, in contrast with the insufficient use of reason, which can be a momentary and unusual episode in a person's life, the defect of discretion of judgment and the impossibility to assume are biographical periods of a person's life. For this reason, then, *the habitual and*

protracted character of those defects of capacity should be the preferred object of adequate procedural proof.

g) *Causes of "psychic nature"*

Finally, the impossibility to assume must be originated by causes of psychic nature. This means, above all, that although it is indispensable for the causes that can provoke that defect of consensual capacity to be of psychic nature, they need not be limited to diagnosed mental illnesses or psychopathologies. Certain deficits in a person's psychological and personality development, which may not merit a psychiatric diagnose, may affect a person's psychological self-mastery and freedom concerning oneself and those behaviours that are essential for the correct ordination of conjugal life to its proper ends and may, as a consequence, injure the person's ability to overcome ordinary and common difficulties of married life, thus generating unbalanced and abnormal reactions that can effectively impede the *minimal essential dimension* of the dynamics of married life.

7. *Differences between the consensual incapacity to the right/duty to conjugal acts, the impediment of impotence and the non-consummation of marriage*

It is not rare that in real life spouses may labour under many different types of difficulties in the performance of the conjugal act, even from the beginning of their marriage. These difficulties may be due to causes that are juridically irrelevant or to reasons, of a very different nature, that can originate a true cause of marriage nullity. It is, therefore, of great practical importance to clearly distinguish between impotence and consensual incapacity for the conjugal acts mainly when, as it happens in certain cases, that distinction presents some difficulties.

In order to give a juridical assessment about a supposition of fact, the interpreter should use of number of key theoretical premises. The starting point is the juridical-canonical concept of sexual potency. The sexual potency is defined as the contracting party's capacity to perform the acts of sexual union in accordance with their natural physical constitution and their ordination to generation (complete sexual intercourse). This capacity is indispensable for marrying validly because the right and duty to conjugal acts is one of the essential rights and duties which is mutually given and accepted by the spouses when marrying and is an essential part, therefore, of the object of consent. Having stated this first principle, one should avoid thinking that (due perhaps to the flat expressiveness of the terms) the impediment of impotence is equivalent to lack of sexual potency. Absence of sexual potency is, without a doubt, a lack of capacity to act in matrimonial matters, but such deficiency can be due to essentially diverse reasons which can originate, not only the impediment of impotence, but also the defect of consensual incapacity, and/or the

non-consummation of marriage. Consensual incapacity and certain impediments are both defects in the capacity to function, but their technique of evaluation, the requirements, the basis for the supposition of fact, the procedural appeals, and demands of proof are very different.

The object of a person's sexual potency is, as already said, the conjugal act of carnal union in accordance with the natural order (complete sexual intercourse). However, the act of sexual intercourse can be considered from the viewpoint of the single act of consummation of marriage (*in fieri*), as the *first* complete sexual intercourse of a ratified marriage (cf. c. 1061), or from the perspective of the *habitual capacity* for conjugal acts, in plural, which are part of the dynamic ordination of matrimonial life to its essential ends (in the *in facto esse*).

So, the impediment of impotence refers exclusively to the *consummation of marriage* and, specifically, to that aspect of the sexual potency required for *the physical performance of the first complete sexual intercourse by the joining of the respective genital organs according to their proper natural use.* In that sense, then, impotence as an impediment occurs by the *incapacitas copulandi vel coeundi*, or the impossibility of performing the first act of sexual intercourse in accordance with its natural physical dynamics. This is why the impediment is explained in terms of the specific physical cooperation of the masculine and feminine organs which determine the persons' corporal fitness for the sexual intercourse. In fact, the impediment of impotence exists, on the part of the man, when the male member cannot be sufficiently erected, or when it cannot penetrate or ejaculate its own semen inside the female vagina. Impotence on the part of the woman exists when she is incapable of receiving the emission of the male semen inside the vagina.

From what is said above, we can now offer several rules to differentiate impotence, lack of *humano modo* consummation because of psychic anomalies, and incapacity to consent to the right to intimate conjugal acts.

First rule: The impediment of impotence, as an impediment is *previous* to the assessment of consensual incapacity, which is also a defect in the capacity to act.

Before the parties can consent to marriage, they must be "persons juridically able" (cf. c. 1057 § 1 as it refers to *personas iure habiles* before defining the *actus voluntatis* in § 2). This means that if the first act of sexual intercourse for the consummation of marriage cannot be carried out according to its natural design, because of one of the defects mentioned above, the impediment of impotence takes prior and principle consideration over the assessment of consensual incapacity. The fact that impotence may originate in a cause of psychic nature or a psycho-pathological dysfunction, and not in an organic cause, does not change the condition into consensual incapacity because the cause of the nullity continues to be the impediment of impotence. Consequently, the impediment of

impotence must be the principal procedural ground of the alleged nullity, and consensual incapacity, if also invoked, must be the secondary and alternative ground. The reason for this procedural order is obvious: the nullity of impediment precedes the nullity of lack or vice of consent in causing the nullity of the marriage.

Second rule: When the spouses possessed the needed *potentia coeundi* between themselves and there was, in fact, a first physically effective sexual intercourse, but this sexual act was, however, defective as a human act, due to a deficit of free, rational will, then the specific facts or *fattispecie* no longer correspond to the juridical/technical configuration of the impediment of impotence but to other, technically distinct scenarios.

According to c. 1061, the valid consummation of a ratified marriage must be carried out "humano modo". A defect in such human act of consummation in the first act of sexual intercourse may be due to the contracting party's antecedent incapacity to endow his or her consent with the necessary freedom required for validity. If this defect of freedom of consent falls within the causes foreseen in c. 1095, then consent is null because of consensual incapacity, and so is the marriage (i.e., as non-ratified), which obviates the need to consider the question about whether the consummation was "humano modo", since the matter of consummation refers only to a valid consent and to a prior, *formally* ratified marriage. Consensual incapacity *invalidates* consent while the non-consummation of a ratified marriage, even if due to a psychic anomaly, is only the cause for requesting its *dissolution*. For this reason the nullity of the marriage, even if doubtful, should be processed first: it would make no sense to petition the Supreme Pontiff for the dissolution of a bond that could be non-existent.

It should be noted that in this type of non-consummation, so different from the impediment of impotence, the *potentia coeundi* on the part of the contracting parties is presumed to exist, as well as the parties' capacity to consent. And this is so because if the *potentia coeundi* was lacking in the first act of sexual intercourse, we would be back to the impediment of impotence; if the capacity to consent did not exist, we would be in the situation of c. 1095; and if the marriage was not ratified or *ratum* but a null marriage instead, it would be useless to be concerned about the fact of consummation. Therefore, what we are now considering is whether or not the first complete conjugal act between the spouses was a human act, an act endowed with appropriate freedom. A fatal defect to the freedom and understanding in the act of consummation can be due to a psychic cause, to physical violence or fear, to ignorance, to error, or to deceit suffered by one or both spouses, by application of cc. 124, 125, and 126 relative to the validity of the juridical act in general, because cc. 1095, 1096, 1097, 1098, and 1103 refer specifically to the act of consent more than to consummation, and these canons can complete, rather than impede, the application of the general precepts to consummation, which is a

human and juridical act. Therefore, if those vices and defects do not invalidate consent in the terms foreseen by cc. 1095, 1096, 1097, 1098, and 1103 (and marriage, then, is *ratum*) but affected consummation, the marriage is not null but is dissoluble, because a consummation that lacks the freedom of the human act is not recognised as a valid consummation according to c. 1061 in connection with cc. 124, 125, and 126 and, consequently the marriage is *ratum* but not consummated.

Third rule: Defective freedom and rational will in the realisation of the first sexual intercourse of a valid (*ratum*) marriage can be due to psychic anomalies, but this type of non-consummation is not a cause of consensual incapacity.

That is so because consensual incapacity refers, by definition, to the act of consenting and not to the act of consummating marriage. The technical juridical notion of non-consummation, as the cause to be adduced in requesting the dissolution, presumes a *matrimonium ratum* and, therefore, even if *the first complete sexual intercourse* was deprived of its integrity, as a human act, by a psychic cause or even a mental dysfunction, we are still facing the fact of non-consummation, even though its cause is of psychic or even psycho-pathological nature. The fact of non-consummation, supported by the lack of freedom and rationality, is the cause for applying for the dissolution of the marriage, and although the fact of non-consummation can be a cause of dissolution, it can never be a cause of nullity. However, since we are now considering the fact of non-consummation as caused by a psychic anomaly, we should inquire about how to measure the *humano modo* deficiency of that first act of sexual intercourse. Concerning the legal capacity required for the validity of juridical acts, c. 124 § 1 indirectly refers to the rules of "sufficient use of reason" or "serious defect of discretion of judgment" of c. 1095,1° and 2° for these, indeed, refer to juridical *capacity* in matrimonial matters. This same canon also requires *the concurrence of those elements that essentially constitute the juridical act* which, concerning the act of consummation, are found in c. 1084 (in relation to impotence) and in c. 1095 (regarding freedom and rationality). It should be noted, however, that the interpretative application of c. 1084 or c. 1095,1° to the fact of non-consummation, due to psychic anomalies causing a "non humano modo" defect, does not transform the request for the dissolution *super ratum* into a nullity case on grounds of the impediment of impotence or of consensual incapacity.

Fourth rule: The proper scope of the consensual incapacity to consent to marriage refers to the contracting party's possession or mastery over his or her will, as specified by the act of contracting marriage, at the moment in which consent is given.

The person's specific type of freedom and understanding is determined by the object of consent, that is to say, by the essential structure of the marriage to be established. This is not what happens with the impedi-

ment of impotence which, as stated above, refers to the *potentia coeundi* or capacity to carry out physically the *first* humanly apt and complete act of sexual intercourse, and only the first one; nor is it the case with non-consummation by reason of a psychic anomaly, in which it is presumed that the marriage was valid (*ratum*), as well as consent, because the contracting party was free from the impediment of impotence and from consensual incapacity. Consequently consensual incapacity is characterised by the contracting party's lack of mastery, at the very moment of contracting, over his or her rational freedom, as this rational freedom is specified by the juridical marriage bond to be established, here and now, with its essential rights and duties.

From the viewpoint of consensual capacity, the conjugal acts, including the first, which is the act of marriage consummation, are seen *consensually,* that is, as the object of an *essential conjugal right-duty* to which the spouses consent. Consequently, the object of consensual capacity is not the conjugal act, but the power to constitute a right-duty over it, as the paradigm of the parties' joint dominion of each one's masculinity and femininity.

Notice that, since the object of consensual capacity is the establishment of a right-duty by means of an act of free and rational will, that capacity refers to conjugal acts in the plural, as a continuous and permanent object of such right. Those multiple conjugal acts which are the object of such right-duty are the initial point of a protracted sexual intimacy ordered to the pursuit of the conjugal good and of the procreation and education of offspring. The *ordinary and habitual possibility* for those conjugal acts, within the vital dynamics of marriage, is, then, the juridical expression of that sexual intimacy. For this reason, when the conjugal act can only occur as something exceptional or extraordinary, unusual or inhabitual, anomalous, traumatic and disturbing, due to the person's incapacity to give and receive it (at the moment of contracting), as the expression of the permanent ordination of sexual intimacy to the essential matrimonial ends, then we clearly are not dealing with impotence or non-consummation. We are dealing, rather, with a possible case of consensual incapacity (c. 1095) supported by the impossibility of assuming, due to a psychic cause, the essential duties of marriage.

Fifth rule: The different types of impotence are not interchangeable with different types of consensual incapacity, because the qualifications used in one mean something specifically and substantially different in the other.

The common point between impotence and incapacity seems to take place in the requirement of antecedence. But this also occurs with all the causes of nullity, for the impediments, the defects and vices of consent, and the defects of form produce their invalidating effect only at the moment of and over the act of contracting, and if they existed before consent but had later disappeared or, in any event, did not exist at that moment, all

those impediments and defects are irrelevant. Indeed, a prior incapacity or impotence which has been overcome at the moment of contracting, or which occurs after giving consent, does not annul the marriage contracted. An incapacity or an impotence occurring after consent, but before consummation, can cause dissolution of the marriage by reason of non-consummation but they cannot be causes of nullity of consent.

Sixth rule: The requirement of perpetuity that c. 1084 demands for the impediment of impotence does not exist for consensual incapacity.

The concept of perpetuity, as it is known (cf. c. 1084), is a juridical concept to be understood as that incurable privation of the *potentia coeundi* for the first act of sexual intercourse, unless through remedies that are extraordinary or illicit, or that imply a probable danger to the patient's life or a serious harm his or her health. The reasons for requiring an antecedent perpetuity in the case of impotence are the following: in the first place, impotence is an impediment, not a defect of capacity to consent, so that a person who is totally impotent is able to endow the act of contracting with its own specific freedom; that is to say, the person would be able to form a ratified (*ratum*) marriage but not able to consummate it. In the second place, since impotence refers to the physical performance of the *first* act of sexual intercourse, or act that consummates marriage, the contracting party who is afflicted by a non-perpetual, but merely temporary, impotence is able to consent to form a ratified marriage that will be temporarily unconsummated. Since the impotence is temporary, the consummation of marriage is within the power of the contracting party who can perform it later.

In contrast with those characteristics of impotence, consensual incapacity is a *defect of the very power to consent voluntarily*, so that the person cannot even form a ratified marriage. By reason of its nature, the act of contracting remains null even though the incapable party may, foreseeably, become capable the following day, after some years, or never. In sum, the temporary or perpetual expectation of a cure for consensual incapacity is irrelevant, because in either case the present consent is totally null as a voluntary act. In other words, the expectation of an easy cure or of the short-term disappearance of the consensual incapacity, suffered at the moment of contracting, does not change the qualification of incapacity and the marriage so contracted is null. This explains why an abstemious party, for example, who consents to marriage while exceptionally but totally inebriated consents invalidly because of lack of sufficient use of reason even though he or she will surely recover the habitual use of reason in a few hours.

Seventh rule: The distinction between absolute and relative impotence is not transferable to the notion of consensual incapacity, as we shall see in the following section.

8. *The so-called relative incapacity*

The present formulation of c. 1095 was not held by either canonical doctrine or jurisprudence while the legal text was being elaborated without being contested. During that interval, and even after the promulgation of the canon, many doubts, discrepancies, and perplexities arose among those who continued to interpret the definitive text of c. 1095 with the interpretive lenses and conceptual codes of former times. This especially affected c. 1095,3° and its relation to 1° and 2°. In fact, the current text of 3° did not appear until the third *Schema*. At first the incapacity to assume was linked to "psychosexual anomalies," but this involved the insoluble difficulty of becoming juridically entangled with psychiatric diagnosis and with the classifications of psychosexual anomalies in order to be able to determine which disorders would or would not incapacitate a person for assuming the conjugal duties. It soon became evident, as well, that an impossibility to assume could be caused by psychic causes other than, and very different from, the psychosexual ones.

For those reasons, the second intent to formulate the text opted to require that the impossibility to assume had to be due to a "serious psychic anomaly". This formula also presented important limitations. On the one hand, it suggested that the seriousness referred to the psychopathological cause and not to the juridical criterion of incapacity, which implied abdicating the canonical assessment of the cause of nullity to the psychiatric field, and to the opinions of the experts in the case, instead of reserving it to the judge's juridico-canonical evaluation. In addition, a juridical impossibility of assuming the matrimonial duties could not be supported by a person's normal state of intellect and will, thus making the requirement about a serious psychic anomaly somehow tautological. Apart from this, it appeared also that other type of causes of a psychic character, but not necessarily classified as mental illness, could cause an impossibility to assume besides those medically diagnosed as psychopathologically serious. In the final writing of c. 1095,3° it was decided to require only that the incapacity to assume the essential duties should be due to "causes of psychic nature". The purpose was to emphasized that the "inability to assume" is the canonical measure of consensual incapacity, which is not to be mistaken by the impediment of impotence caused by functional defects of a psychic origin, as we shall now see.

That brief account of the historical precedents of the text of c. 1095,3° may help to clarify the issue of the viability of a "relative impossibility to assume," more frequently known as "relative incapacity". The central argument of those who defend this *caput nullitatis* stresses that the spouses do not contract a generic and abstract marriage but their own specific and unique marriage; the defects of capacity, therefore, should be assessed within the framework of the relational nature of every marriage and with a view to the specific and unrepeatable individuals who contract

marriage. Consequently, it is said, a person may not be able to fulfil the essential duties of the marriage with this concrete individual but may be able to fulfil them with another individual. Therefore, they conclude, there can exist an absolute incapacity (or incapacity with all other individuals) and a relative incapacity (or incapacity with one or some individuals).

This misunderstanding comes from a methodologically incorrect transposition of the categories of the impediment of impotence to consensual incapacity. The difference between the object of the capacity to consent and the object of the potency for the conjugal act is so substantial that the notions involved in one cannot be transferred to the other. The distinction between relative and absolute impotence corresponds to reality because complete sexual intercourse, which is the object of the *potentia coeundi*, is the physical act of joining the male and female genital organs, and this physical coupling may indeed be possible with some partners or impossible with some or with all, and this being so, it is also irrelevant whether the cause is organic or psychic because, in the end, the person affected by impotence is incapable of coitus, which is the *joined physical act* between the man and the woman. In contrast, the object of consensual capacity is the actual exercise of each party's power of free and rational will, or *power of self-determination residing in the persons and exercised by the person, which is a power of spiritual nature.*

The specific act of the will contained in the internal consent of each contracting party is not a physical, bodily action, but an act of the intellectual and volitional faculties of a spiritual subject; it is a strictly unique spiritual and most personal act of willing freely and rationally. In the one act of manifesting consent, two voluntary acts are joined, each one being a single and complete voluntary act, so that if one is missing, no formation of marriage takes place. By reason of its being a self-determining act, each free, rational, and voluntary act of consent is a subjective, personal, autonomous, and unique act: it is an act of the personal subject. Hence, consensual capacity is always, by definition, the *individual's, in and by oneself, personal capacity.*

To that substantial difference between the *potentia coeundi* and the power to consent, we should now add the differences deriving from the object of consent. While the object of the first is a joined physical action, the second object is a spiritual reality consisting of the juridical bond with its properties, its inherent rights and duties, and its ordination to the objective ends. The essential structure of marriage is essentially spiritual, juridical, and objective. A person's capacity to consent means that the person has sufficient freedom and reason relative to the objective essential structure of marriage: the bond, the properties, the duty-rights, and the ends.

As a result, the freedom required for valid consent is not *relative* (is not to be measured in relation to the other contracting party's psychological subjectivity), but *objective regarding the essential structure of marriage*, which is the natural institution to which a person is inclined by his

or her own sexually endowed human nature. The measure of sufficient freedom, and of consensual capacity, is not the subjectivity of the contracting parties nor the mutual suitability of their unrepeatable subjectivity or psychological personality, which is the same as the mutual understanding and psychological harmony between the spouses. To say it briefly, a valid marriage is not the one that contains in its essence a guarantee of psychological mutual understanding and happy communication between the spouses, for marital well-being and matrimonial validity are not equivalent. The permanent, subjective sense of happiness is not an objective end of valid marriage, even though it may generally be one of the main subjective motivations of weddings. Validity of marriage is not synonymous with a smooth marital coexistence but, rather, is perfectly compatible with difficulty, sometimes heroic. In short, consensual capacity is in fact the power of determining oneself, and by oneself, to marriage. By definition, that which is in and by oneself cannot depend on anyone else and, therefore, any qualification of consensual capacity can be neither relative nor absolute in the sense in which these terms are applied to impotence. If the free, rational nature of consent is *sufficient*, then it is *fully* effective in the juridical order; and if it is insufficient, then it is totally ineffective in juridical terms: consensual capacity, as a juridical fact, is either sufficient and, therefore complete, or non-existing at all. The person's *power for voluntary self-determination cannot be relative* because it is not, by definition, a power residing in or exercised by another person. In summary, the freedom implied in consensual capacity is sufficient, complete, and proper of the person; the standard to measure its sufficiency is objective, namely the essential rights-duties of marriage; the notes of consensual capacity juridically effective are: complete, proper of the person, and objectively sufficient.

The argument that favours a "relative incapacity" derives also from a confusion between the *lack of capacity*, as cause of nullity and as juridical notion, and the absolute or relative character of the *clinical symptoms* of a given psychic cause, its development, and its degree of seriousness in a patient's actual condition. That which should be regarded as a mere situation of fact is converted into a juridical defect of capacity and a cause of nullity after the fashion of the three juridical types of deficient capacity of c. 1095. However, it must be kept in mind that, from the conceptual point of view, any defect or vice of consent is a defect properly of the person because consent is always an act proper to the person. As an efficient juridical act, matrimonial consent can be neither "absolute" (with all) nor "relative" (with one or some) because it is always an act inherent to and elicited by the person. In the life history which motivates this personal act many persons, including the other spouse, can participate either favourably or unfavourably, but all the combined motivations of the voluntary act of consenting do not change the fact that this act is always an act characteristic of the individual person. The engaged couple can be motivated relatively to exclude, for example, offspring, or indissolubility—which

exclusions can be made by either or both of the persons engaged to be married—, but the act of excluding that invalidates consent is always a voluntary act of each contracting party. In the juridically relevant "error of fact," as well as in "malicious error," the parties do influence each other ("relatively"), but in the end the invalidating error is always a defect or vice of the act of the contracting party—of the party who errs. One cannot say that neither contracting party simulated but that the couple did simulate, or that neither this spouse nor the other erred but that it was the relationship or the bond that erred. Those favouring "relative incapacity" forget that, in the juridical order, both consensual capacity and its defect are of the individual person (either the person's endowment or defect), and that this is so apart from the actual relational process for which each individual person may be capable or incapable.

When that personal aspect of consensual capacity is overlooked, one can reach some rather absurd conclusions, stating, for example, that while each contracting party is absolutely capable, they are, however, incapable for each other. If that statement is analysed with a minimum of attention, it amounts to saying that since each contracting party is capable, the marriage is the one incapable: validity and nullity can be predicated on the bond but not on consensual capacity or incapacity. Another absurdity would be to say that while both spouses are individually incapable, as it happens in certain cases of psychosexual anomalies with masochistic or sadistic symptoms, they are "relatively" capable in relation to each other because of the complementariness of their respective anomalies (the masochist with the sadist). The formula "relative" incapacity, although expressed in terms of "capacity," is in fact used only for the impossibility to assume. This shows the argumentative weakness of the proposition, for we cannot use the concept to refer it the other two paragraphs of c. 1095, that is, to "lack of sufficient use of reason" and to "serious defect of discretion of judgment" since it is evident that "use of reason" and "discretion of judgment" imply possession or deficit in the person and by the person. In fact, "relative" incapacity promotes to the rank of cause of nullity a number of mere situations of fact about the impossibility of assuming, and this occurs because of a mistaken interpretation of the term *assumere*, which is translated as "to fulfil," and also because the requirement of "antecedence" to, at least, the time of contracting, is not applied, thus making it impossible to estimate the invalidating effect of any of the defects of capacity of c. 1095.

The most serious arguments in support of the proposition favouring "relative incapacity to assume" refer to those situations in which one or both of the persons engaged to be married may show personality traits, existing before the act of contracting, of insecurity, psychic fragility, deeply rooted prejudices from one's upbringing, environment, or of a psychic origin which, not being psychic dysfunctions or mental illnesses according to psychological or psychiatric diagnoses, are nevertheless real

limitations and defects. If those weaknesses, limitations, and defects are significantly related to matters characteristically under the conjugal duties, it can happen that the character traits of the parties can aggravate each other's limitations, insecurities or failings, even to the point of causing, by the time of the celebration of the marriage, a real impossibility to assume the essential obligations of marriage with that particular contracting party. We should parenthetically note that, as already mentioned, every marriage is a concrete, specific marriage, as is also every process preceding marriage consent, which itself is always a consent relative to, or in relation with, the other partner, who is also a particular human being. In the hypothesis described above, we are facing a psychic cause, not necessarily psychopathological, that explains the impossibility of assuming at the moment of contracting with the other party, because it has been with respect to the other party that a light to moderate limitation has been aggravated to the point of causing consensual incapacity, and it is with that other party that the marriage celebration has taken place. Notice the decisive importance of the *antecedence of both the psychic cause and its ultimate juridical effect*: the psychic cause that originated from a disturbing and aggravating relationship has effected the impossibility to assume, which is a defect of the particular capacity of each or both parties. In this particular hypothesis we cannot say that the parties are absolutely capable and that the "marriage" is incapable; we say, rather, that there is a defect of capacity in one or in both parties, and that its *factual origin* is constituted *de facto* by the deficiencies, frailties, or defects aggravated by the *de facto* relationship. The hypothesis discussed is one of the possible situations of fact that may constitute "the cause of psychic nature" required in c. 1095,3°, but this psychic cause and the facts that have generated it are not to be confused with the impossibility to assume, which is the actual juridical defect of capacity, as clearly differentiated in the text of c. 1095,3°, and which is always characteristic of the individual person.

It may not be easy to assess the juridical consequences of the factual situations discussed above when the evidence supporting the actual impossibility to assume - *not the cause of the impossibility* - appears for the first time after the marriage celebration. This can happen, for example, with certain objective difficulties preventing the ordinary, natural, and regular performance of intimate conjugal acts in ways that are not anomalous or physically and psychically painful or traumatic. In those cases, it will be necessary to examine the psychic cause of the impossibility, and to prove its antecedence as well as its disabling effect on the consensual capacity. We should remember that the defect of discretion of judgment and the impossibility to assume cover biographical stages, so that even when lacking clues from antecedent facts, the nearness to the time of the wedding of the actual impossibility to fulfil can provide a moral certainty about the psychic cause of the defect of capacity existent during the biographical period in which occurs the precise act of contracting marriage. The complete factual knowledge of the case according to its chronological

and biographical sequence, which allows the establishment of the actual causalities between the facts, and where appropriate the thorough instruction of the case, are decisive for the correct qualification of those situations bordering between the impossibility to assume at the time of marriage *in fieri* (which easily appears during the marriage *in facto esse*) and the impossibility that has occurred during the matrimonial life (after a valid marriage *in fieri*); especially when this belated impossibility derives from a psychopathological framework aggravated by the factually infelicitous relationship between the spouses. The interpreter should not mistake the impossibility to assume the essential duties with the difficulty to fulfil, or with the unsuitable, imprudent, or unsuccessful choice of spouse; and especially when the belated impossibility has been caused by reactive psychopathological disturbances. If that mistake is made, then, as John Paul II said, "every obstacle that requires effort, commitment or renunciation and still more, every failure in fact of a conjugal union, easily becomes conviction of the inability of the presumed spouses to try correctly and to succeed in their marriage".[1]

9. *Criteria for categorization and proof· some debated questions*

a) *Postulates for a correct exegesis*

For the interpretation of c. 1095, three basic components contained in the text itself should always be taken into account. The first component, *the fundamental principle of the canonical marriage system*: namely, that marriage consent is understood as the concurrent act of intellect and will, proportionate to its object, by which the person assumes the essential juridical consequences of his or her act. The object is the marriage: a natural human reality to which human nature is disposed and made capable. From both the nature and the object, the legislator has extracted the notion of capacity as well as three criteria to measure its existence or its deficiency.

The second component, *the supposition of fact* (*fattispecie*), various anomalies and dysfunctions of the human psyche, which may affect consent in many various ways and degrees, and insofar as marriage consent must be a human act proportionate to the matrimonial commitments and to the implementation of the duties of the marital partnership throughout one's lifetime.

The third component, the *juridical regulation* formed by the definition of consensual capacity and incapacity. Accordingly, the act of contracting is not sufficiently free and rational for the validity of matrimonial consent when one of the contracting parties suffers from such a deficit of

1. JOHN PAUL II, All. *Ad Rotae Romanae auditores coram admissos*, February 5, 1987, no. 5, in *AAS* 79 (1987), p. 1456.

self-mastery over his or her process of knowing, wanting, and responding to the juridical consequences of his or her own acts that such deficiency can be described, as c. 1095 does, as "insufficient use of reason," "serious defect of discretion of judgment," or "inability to assume the essential marital duties".

In the use of those three components, it is highly recommended that the interpreter employ a *sound, solid, and proven anthropology* of the human act, of the meaning of human sexuality, and of the nature of consent and marriage in accordance with the Magisterium, the canonical tradition, and the uniform and stable jurisprudence of the Roman Rota. The interpreter ought to resist any temptation to improvise new or personal views concerning the great anthropological questions and apply them to the particular case with disregard for the strictly scientific, doctrinal, and jurisprudential tests of new hypothesis, mainly when these seriously modify the canonical tradition on marriage.

The interpretation of c. 1095 requires a *conceptual and methodological purity that respects the juridical nature of consensual incapacity.* Specifically, the juridical meaning of "lack of sufficient use of reason," "serious defect of discretion of judgment," and "inability to assume the essential marital duties," of c. 1095 should not be replaced with definitions, standards, and diagnostic criteria taken from other sciences (specifically from clinical psychology and psychiatry) to replace the canonical meaning of the terms, especially when referring to matrimonial consent, to the capacity to supply it, and to the elements that form the essential structure of marriage. For instance, the meaning of *incapacity* or of *impossibility,* as well as the standards by which those notions are measured, are different in canonical matrimonial Law and in the various currents of psychiatry; therefore they are not indiscriminately transferable from one field to the other. The rightful and useful help that other sciences can provide to matrimonial Law should not lead to an interpretation of the juridical meaning of the notions of c. 1095 with the current meanings of some school of psychology or of psychiatry.

Likewise, the interpretation and classification of each case, under the light of c. 1095, should specify in the most concrete way the causal link *in casu* between the psychic anomaly and the resulting insufficient use of reason, serious defect of discretion of judgment, or inability to assume the essential obligations of marriage. One can attain such precision by means of a careful examination of the procedural evidence and of the facts, actions, and forms of behaviour of the person's ordinary life, during non-suspect time. By following the rules that measure incapacity, one can infer the intensity of the psychic effect on reason and free will in a person's government of self and of his or her behaviour. One should avoid to changing the precise juridical meaning of the normative criteria by which c. 1095 defines consensual incapacity with ambiguous expressions such as "incapacity to establish a true communion of life and love," "inability to

form a healthy interpersonal relationship," "incapacity to give oneself to another person," "inability to love," "constitutional incompatibility," "incapacity of the spouses in relation to each other," "inability of testifying Christ's union with the Church," and other similar ones.

b) *A unitary and positive notion of consensual capacity: its exegetical function*

In the text of c. 1095, the legislator has sought to establish one conceptual category, that of consensual capacity which serves as a common foundation of the differences among the lack of use of reason, the serious defect of discretion of judgment and the inability of assume the essential marital duties. It is important to use this unitary and positive concept to avoid the serious errors that would derive from thinking that c. 1095 establishes three incapacities for marriage. It is rather evident that there is only one common conceptual category when one realises that incapacity is nothing but the defect of the one and only consensual capacity, since there are not three different capacities for matrimonial consent nor does capacity admit any division in parts, as there is no such things as a partially valid consent or a half valid marriage. It is not possible to establish some parts of the essential structure of the marriage and not establish others. In addition, there is one consensual capacity only because consent is also one indivisible reality, in spite of its internal complexity, so that there cannot be three different consents, each one with the power of establishing a marriage. In sum, because the one and irreplaceable cause of marriage is consent, and because consent is the one act of free rational will that canon 1057 defines, the capacity to supply consent is also one and its defect, i.e., incapacity, is also one unitary conceptual category.

The first consequence of what is said above is that there is a common basis for the invalidating effect of any of the three legal meaning of the normative criteria contained in the three paragraphs of c. 1095: it implies a whole or complete defect in the free and rational nature of valid consent; the three are defects of the same and one consensual capacity and, consequently, the three normative criteria, in spite of their diversity, *imply the total absence of the same and one consensual capacity and the three cause the same final effect of totally invalidating consent and marriage*. The immediate practical consequence is that, although each normative criterion refers to a *different* aspect of a truly voluntary consent, each one measures an *essential* aspect of the efficient force of that freedom and rationality, without which the *entire* consent becomes juridically non-existent. By reason of this effect on the whole free will, each different criterion is in itself sufficient, if it is proven, to cause the nullity of the marriage by reason of lack of consensual capacity. For this reason also each criterion of measure is by itself, on the one hand, a *caput nullitatis*, and on the other hand, *a modality of the absence of that one consensual capacity*.

Knowing, then, that each criterion of measure of incapacity is in itself invalidating while there is only one consensual capacity corresponding to only one consent, it is now time to draw some important exegetical consequences. The principal consequence is that the differences corresponding to each criterion of measure (one utilises the use of reason, the other the discretion of judgment, and the third the ability to assume the marital duties) should not be understood as "different psychic degrees" of incapacity or as "three different psychic inabilities". Juridically, the person who lacks sufficient use of reason is not more incapable than the person who labours under a serious defect of discretion of judgment, or than the one who is unable to assume the essential duties; even though the last two conditions may be said to be psychologically "less serious," all have the same invalidating effect. That mistake of interpretation would lead to conclude that the three paragraphs of c. 1095 classify mental illnesses and psychic anomalies *in function of their psychopathological seriousness*, a mistaken notion derived from confusing the psychic anomaly with some of the three normative criteria that define incapacity, that is to say, with the cause of the nullity. When this confusion exists, it leads to thinking that n. 1 of c. 1095 contains those very serious mental illnesses that deprive a person of the use of reason; while the second paragraph would refer to less serious illnesses as, for example, all the various lacks of affective maturity; and finally, the third paragraphs would not even require any anomalous psychic cause but only the inability to fulfil the conjugal duties during the marriage *in facto esse* because of a non-anomalous cause of psychic nature, as would be the case, for instance, of psychological aversion toward the other partner.

Another incorrect interpretation is that which sees three steps of psychic incapacity: no. 1 of c. 1095 would represent the most extreme level of incapacity no. 2 a medium level, and no. 3 the less severe. To each step would correspond different degrees of seriousness on the part of the psychic cause: a "serious, permanent and total" seriousness of the psychic cause would correspond to the lack of sufficient use of reason, a "less serious and temporary" psychic condition would correspond to the serious defect of discretion of judgment, and one "relative to the spouses," and limited to the marriage *in facto esse*, would correspond to the inability of assuming the marital duties. In fact, as we have already said, c. 1095 is not a classification of psychopathologies, so that, any psychic block may, at least in theory, produce a lack of sufficient use of reason, or a serious defect of discretion of judgment, or the inability to assume the essential marital duties. The juridical qualification of a particular condition does not depend on the psychopathological nature of the anomaly but on the end result that such psychic anomaly may produce on the use of reason, the discretion of judgment, or the ability to assume the matrimonial duties, thus causing the particular degree of inadequacy described by the criteria of c. 1095 to estimate the incapacity. In this sense, for example, a serious episode of schizophrenia, accompanied by delirious syndrome,

suffered by the contracting party at the time of giving consent, and a state of complete intoxication at the time of the celebration of marriage by a normally abstemious person who, exceptionally, drank excessively the previous night, are obviously two substantially different psychic causes producing the same juridical effect of depriving the persons of the required sufficient use of reason. At the same time the same psychic cause (for example, an advanced stage of disintegration of personality from chronic heroin dependence in a sixteen year-old youth) can be juridically qualified as an insufficient use of reason, or a serious defect of discretion of judgment, or as an inability to assume the essential marital duties.

The integrating role of the human consensual capacity to consent to marriage, or, in the case of incapacity, the disintegrating effect of a person's incapacity, shows that some attributes of this human capacity should be understood in a unitary fashion, that is to say, they can be equally predicated on each of the three normative criteria to measure the capacity without any discrimination either in their conceptualization or in their requirements of proof. Indeed, the resulting incapacity is absolute or total in the three measures; many mistakes of great theoretical, and mainly practical, consequence would derive if that absolute character were attributable, for instance, to the insufficient use of reason only but not to the other two legal measures, or if antecedence, at least relative to the moment of contracting, were to be required for the insufficient use of reason and the serious defect of discretion of judgment but not for the inability to assume the essential duties. More examples could be found in relation to the other characteristics of the capacity to consent as a unitary category.

Certain disputed questions about the differences among the three paragraphs of c. 1095, and certain doubts of interpretation which have been debated only in connection with the inability to assume the essential duties of the marriage, should be discussed, in actual fact, at the level of those characteristics common to consensual capacity as a unitary category, and not just in reference to no. 3 of the canon; only when seen as affecting the common features of consensual capacity can those questions find an appropriate and satisfactory solution. Those common characteristics are the following: the basis for the invalidating effect is the same for the three legal measures; each legal measure of incapacity is of a juridical nature; the three are different from the impediments of nubile age, impotence, and sexual defect; they are to be distinguished from the psychic cause; they require a proportionate causal nexus with the psychic anomaly; the incapacity they originate is absolute; they must be antecedent or the invalidating moment of the incapacity is related to the act of contracting, their reference to consent and its object determines their juridical gravity; human consensual capacity is a developing and perfectible process; they accord the equal relevance to the expert's proof.

c) *Distinction between anomaly and incapacity and their causal relation*

The experience of life teaches that many and various psychic situations can perturb, in a transitory or permanent way and *in very different degrees of intensity*, the process of rational understanding of marriage or the process of free determination in establishing and assuming the marital duties. These are essential components of consent, that rational, responsible, and proportionate act of free will that forms a marriage. Experience also shows that there are many persons who suffer some psychic difficulty, alteration, or disturbance at some moment or during some period of their lives, so that no one can be completely sure of never experiencing circumstances of this nature. It is evident, then, that the existence of disturbances and dysfunctions of psychic nature does not necessarily means a loss of the capacity for human, intelligent, and free acts, even those that are arduous and seriously binding. John Paul II has observed that "the case of real incapacity is to be considered only when an anomaly of a serious nature is present, which, howeve r it may be defined, must substantially vitiate the capacity of the individual to understand and/or to will".[2] *Psychic anomaly and consensual incapacity are two different realities which do not always coincide and, therefore, should not be confused. At the same time, consensual capacity and psychic anomaly can coexist.*

Thus, a person suffering from a psychic dysfunction can marry validly, provided that at the moment of supplying consent, the psychic anomaly does not deprive the person of sufficient use of reason, or of discretion of judgment, or prevents the party from assuming the marital duties. Psychic anomaly or mental illnesses are not synonymous with consensual incapacity. That which is a fact is not to be confused with the Law. Many persons with psychic dysfunctions and anomalies, existing at the moment of giving marriage consent, enjoy consensual capacity and can marry validly.

Having emphasized the previous statement, it is also necessary to stress that under the consensual incapacity of c. 1095, in any of its three ways of measuring it (the insufficient use of reason, the serious defect of discretion of judgment, and the inability of assuming the essential marital duties), always underlies the fact that the person suffers from a psychic anomaly. In other words, *the existence of a psychic anomaly does not necessarily imply consensual incapacity for the marriage; but the existence of the consensual incapacity is always sustained by the fact that the person labours under a psychic anomaly.*

Between consensual incapacity and a psychic anomaly, which is the supporting fact that causes the incapacity at the juridical level, there has to be a necessary and proportionate, but not always sufficient, causal relation. The reason that this psychic cause should be an anomaly is the following: consensual incapacity for marriage is a very serious defect, at the

2. JOHN PAUL II, All., February 5, 1987, cit., no. 7, *ibid.*, p. 1457.

juridical level, which cannot be a "normal state" of the human psyche at the factual, existential level. A profound contradiction would arise between the juridical order and the real existential order if a person's incapacity for consent (which implies deficient mastery of self and of one's actions) were to be compatible with normality and thus could be proposed as a good and fitting state for the human person. The real privation of the internal capacity to consent has to result, therefore, from an anomaly of the psyche because marriage is an elementary natural reality to which human nature inclines the person in its dual modality of man and woman. If this human capacity to form a marriage, and to live in it, is to be called natural, it must be within reach of any human person. For this reason, there exists a natural right to marry, which is a human or fundamental right characteristic of the human person, namely the *ius connubii*. It would not make any sense to think that there can exist a class of human beings who, without any anomalous condition to explain their situation, would consider normal not to have the ability to exercise the *ius connubii*, in the sense of being "normally" incapable of establishing a marriage.

Incapacity for marriage is a *defect* and not a juridical good and its factual cause must be an *anomaly*. It is an anomaly in the juridical order that refers to consensual incapacity. That is to say, this anomaly refers to the psychic defect in a person's capacity to exercise the *ius connubii*. The notion of anomaly does not completely correspond to the clinical meaning that the same term, or other related terms such as dysfunction, disturbance or even illness, it may have in psychiatric classifications. To be incapable of marriage consent is a *serious juridical defect*, that is to say, a juridical vice and not banal or light, but a very significant one. As a consequence, the psychic cause that provokes that defect must, logically, be something sufficiently anomalous as to cause that so serious defect of the natural juridical capacity. Between consensual incapacity, as a juridical reality, and its psychic cause, as a real, existential fact, there must exist a proportionate causal relation.

That proportionate causal relation that must exist between the psychic cause and each of the three modalities of incapacity should not be confused with the notion of "seriousness".

This seriousness refers to the rate of the juridical end result which the psychic cause has produced over a person's consensual capacity. By "end result" we refer to that relevant moment which is the moment of contracting. If in the end, the anomaly, regardless of its etiology, diagnosis, or clinical prognosis, deprives the person of sufficient use of reason, it causes a serious defect of discretion of judgment, or it disables the person from assuming the essential marital duties, then the defect of consensual capacity is serious. This "seriousness" is in fact the final juridical effect of depriving the person, through one of the three modalities, of the ability to endow consent with the specific freedom and rationality that its validity requires. Therefore, the concept of seriousness and the rules to measure it (the three paragraphs of c. 1095) are *juridical.*

d) *Difference between consensual incapacity and the impediments*

The point of departure for understanding that difference is the distinction between juridical capacity and the capacity to act on matrimonial matters. Every human being is by nature inclined towards the opposite sex and entitled, therefore, to that innate right to marry, the *ius connubii*, which is exercised by means of a *juridical faculty or capacity.* However, a particular person may be prevented from validly exercising the *ius connubii* because of a number of circumstances that are incompatible with or unsuitable to the exercise of the right. This person, then, lacks legal *capacity to act* and, in this sense, the juridical notions of consensual incapacity, lack of nubile age, impotence and sexual defect coincide in being defects of a person's capacity to act.

Nevertheless, there exists a substantial difference between consensual incapacity and the impediments, mainly with non-nubile age and impotence, and with sexual defect. In the case of the impediments and of the sexual defect, the person is regarded as a potential *contracting* party, or a subject of marriage, who is denied of the faculty to exercise the right. Since marriage is an objective juridical institution, society can deny to the person, from an institutional perspective and through the competent legislator, the faculty to validly exercise the *ius connubii.* In other words, the law can restrict the person's capacity to act. In the case of consensual incapacity, by contrast, the person is regarded as a *subject of consent,* or potential author of the voluntary act of contracting, who lacks, however, the degree of sufficient free rational voluntariness needed for valid consent. This is not the case of the person under an impediment, for such person is able in principle to form and express the human act of free rational nature that is consent; this person possesses that degree of specific free and rational will required for the particular act of contracting, here and now, which is the nucleus of consensual capacity. This nucleus of the capacity to consent is not influenced by any impediment, and it cannot be the object of an impediment since that subjective will, which we call consensual capacity, can only be measured in each particular and concrete case, and for this reason, a general and *a priori* prohibition for a particular internal act of consenting, here and now, by an individual person would be unsuitable.

The essential difference that exists between the impediments and consensual incapacity has an immediate practical consequence; namely, it prevents the specific features and requirements of each impediment from being turned into features and requirements of consensual incapacity. Such incorrect transfer of the characteristic and proper rules of the impediments and those of consensual incapacity should be avoided with special care as regards to nubile age, sexual defect and, mainly, the impediment of impotence, as already seen, otherwise one is exposed to serious confusions when assessing the factual situations of an alleged case of consensual incapacity according to c. 1095.

e) *Consensual incapacity and the impediment of age*

The impediment of non-nubile age (cf. c. 1083) is not a synthesis of the person's physical maturity for sexual union and his or her mental maturity or discretion of judgment, which is then expressed by means of a number of years, fourteen for the woman and sixteen for the man. This mistake in understanding the age impediment leads to one to suppose that discretion of judgment of c. 1095,2° constitutes one of the elements of the age impediment (c. 1083), and, vice-versa, that the components of one canon are interchangeable with those of the other canon. Consequently, if discretion of judgment happens to be present in a particular subject less than fourteen or sixteen years of age, respectively, it no longer makes sense to maintain that the impediment of age apply and, likewise, that discretion of judgment can be presumed *iuris et de iure* in those who have reached those ages. The reality of the matter, however, is very different.

The principal meaning of the non-age impediment, however, derives from the premise that although human beings are indeed born with an either male or female sexual modality, they are not born married, but rather the condition of spouse and the married state requires a particular, minimally suitable age termed the nubile age. Marriage is not an appropriate state of life for a person before that age, not even when the person may have, in spite of chronological age, the required mental or physiological maturity, or even when both parties may be equally precocious. In this sense, childhood and pre-puberty are not the suitable periods for marriage. The child-spouse, even if a genius or prodigy, is an abnormality because before attaining the nubile age, there is another epoch in the person's life which is the non-nubile age. Through the course of time, a person acquires the age suitable for marriage, which is the nubile age. Given the fact that there is an age that is objectively unsuited for marriage, the legislator needs to prudently fix the starting point of the nubile age and in order to achieve that purpose he can make use of various technical solutions. Keeping in mind the world's great ethnic and cultural variety to which the canonical norm is addressed, the use of the term "puberty" would lead to great differences of interpretation and to applications of the term to many different ages, as proven by the diverse times that men and woman of different climates and cultures reach puberty. That approach would imperil the deference that is due to the objective non-nubile age, as shown by the historical oddities of espoused children. Instead of having recourse to a concept such as puberty or discretion of judgment, or to such a variable fact as the physical power for the sexual act, the canonical legislator has opted to draw a borderline marked by a minimal number of years which, indicating that there exists in human life an objective non-nubile age, it ensures that the fundamental meaning of the non-age impediment is preserved, namely, that there *always exists a natural and objectively non-nubile age.*

In contrast with the bottomline that marks the beginning of nubile age, consensual capacity refers to something quite different, namely, the individual person's possession of the specific freedom required for the particular act of consenting, here and now. This freedom, although related to the natural human development and to puberty, is not necessarily acquired by the mere passage of time, as is the case of nubile age, but it depends on psychic factors that can fail to develop, so that the simple course of the years is no guarantee of its being automatically acquired. In short, the age impediment ceases, in any event, with the simple passing of time while consensual capacity is not acquired, nor it does necessarily disappear, by the mere course of the years. Nubile age and rational freedom are two different things. In a person's natural process of attaining psychological maturity, there is a time component or "normal age" when the capacity to consent to marriage is acquired, but this normal time for acquiring discretion of judgment, as well as the ability to assume the marital duties, should not be confused with nubile age or with the specific meaning of the term "age" in the expression "nubile age" and its corresponding impediment. Consequently, the ways to determine the impediment of nubile age of c. 1083 cannot be simply transferred to c. 1095 in order to measure the capacity for rational freedom of the person consenting. Specifically, nubile age, in itself, does not guarantee sufficient use of reason, discretion of judgment, or capacity to assume the marital duties, and it cannot be used as an essential component of the ways to measure consensual capacity.

f) *The former classifications of mental illness and disorders and the new juridical categories*

The expressive and novel arrangement of the text of c. 1095 is taken from the notion of consent seen as a specific act of the will which, completing the contracting party's interior process of free rational will, is directed to actualise, here and now, the entire essential structure of a specific marriage. The canon has not been inspired by the notions and categories of mental health and its anomalies or illnesses as classified by the clinical psychological sciences. The source of c. 1095 is, rather, the tradition of canonical doctrine on the voluntary nature of consent and on the essential structure of true marriage. This explains why the final text of the canon did not include such expressions as "mentis morbo aut gravi perturbatione animi" or "gravis anomalia psychica" found in the prior provisional writings of nos. 1 and 3. Such legal expressions strongly favoured the tendency to see the psychic dysfunction as the cause of nullity.

This important change of approach made certain technical terminology obsolete. Indeed, before the new Code, canonical doctrine and jurisprudence used to classify the defects and disorders of the mental faculties according to a triple division inspired by c. 2201 (*CIC*/1917). In the first place, under *amentia habitualis* there were included those mental anomalies and dysfunctions that were total and permanent, and within this category a distinction was made between *amentia totalis* which deprived a

person of reason on all aspects of life and, therefore, also for marriage, and *amentia partialis* which affected only certain aspects of a person's life; the latter would incapacitate a person for marriage only when it affected his or her matrimonial life, and for this reason it was known as *insania in re uxoria*. In the second place, mental dysfunctions of a transitory character (*mentis exturbatio*) which would totally deprive the person of the normal use of the mental faculties but, contrary to *amentia totalis* (*habitus morbosus*), only during a transitory or momentary period (*actus morbosus*); consequently, a transitory *mentis exturbatio* would incapacitate a person only when the act of contracting had been carried out under that transitory disorder. In third place, so-called feeblemindedness (*mentis debilitas*) would apply to a person with an imperfect use of reason; it could be congenital or acquired as well as permanent or transitory. For this mental deficiency to imply consensual incapacity, it should be sufficiently serious for an habitual deprivation in the person of the discretion of judgment proportionate to marriage consent at the moment of eliciting it.

As is evident, the former categories and even terminology were directly inspired by the symptomatology of mental illness understood as partial or total, permanent or transitory, and ultimately as curable or incurable. Constant developments in the fields of psychiatry and psychopathology in the twentieth century, some of them quite spectacular, have changed how symptoms are defined, their etiologies interpreted, and how diagnosis, prognosis and treatment, especially medication, are administered. These, in turn, prompted important changes, discrepancies, and uncertainties in doctrine and jurisprudence concerning the illnesses and dysfunctions that could incapacitate a person for marriage. The issues of lucid intervals, latent disorders, progressive dysfunctions, or psychological affective disorders or disorders of orientation and of sexual inclinations not unanimously classified as mental illnesses and not fitting within the framework of the traditional canonical classifications, became polemical issues not definitively resolved to the satisfaction of all involved.

With the promulgation of c. 1095, which formulated the sources of consensual incapacity and the three criteria of measuring its existence or inexistence by means of the notions of "lack of sufficient use of reason," "serious defect of discretion of judgment," and "inability to assume the essential duties of marriage," it should be understood that c. 1095 reorganizes the new criteria of measuring capacity according to principles and concepts of an exclusively juridical meaning. For this reason, "it is important that categories belonging to psychiatry or psychology should not be automatically transferred to the field of canon Law without making the necessary adjustments which take account of the specific competence of each science".[3]

3. JOHN PAUL II, All. *Ad Romanae Rotae auditores simul cum officialibus et advocatos coram admissos, anno forense ineunte*, January 25, 1988, no. 6, in *AAS* 80 (1988), p. 1182.

The first practical consequence of the new norm of c. 1095 is the abrogation of the previous classifications, excessively linked with the categories of mental illnesses and the changing and polemical views of those classifications by psychiatry and clinical psychology. The second practical consequence is that the interpreter should not read the normative criteria of the current c. 1095 from the former viewpoint and try to adapt the old classifications of mental illnesses—*amentia*, insanity *in re uxoria*, transitory mental disturbances, or feeblemindedness—to the categories of insufficient use of reason, serious defect of discretion of judgment, or inability to assume the essential conjugal duties, as if the text of c. 1095 had been a mere terminological change and as if the exegesis of the new text would simply consist on seeking concordance and adaptation between the old and the new classification. If one's interpretive approach to c. 1095 were limited simply to establishing a way to reconcile the old and the new terminology one would totally undermine the legislator's intention.

g) *Internal freedom, affective maturity, and lucid intervals*

A fragile self-mastery of a person's internal freedom and an affective and emotional immaturity are of particular interest among those factual circumstances which can serve as an incubator for the worsening of a relationship which can ultimately lead to an inability, on the part of one or both parties, to assume. None of those situations is a cause of nullity, as is evident in the three paragraphs of c. 1095 and from the distinction between psychic cause and defect of capacity. Nevertheless, a fragile possession of interior freedom, as well as affective immaturity, can frequently be psychic causes of consensual incapacity, as shown by experience.

Before and after the restructuring of how consensual capacity is treated in c. 1095, it was not uncommon to allege either lack of *interior freedom* or affective immaturity as causes of nullity. In light of the current c. 1095 it appears, however, that recourse to such factors would technically be incorrect. Third party threats (understood according to the requirements for force and grave fear in c. 1103) can deprive one of the liberty necessary to perform acts of one's own and make one function with such a degree of self-alienation that an action can in no way be considered as free and voluntary. In addition, it can also happen that, without meeting the requirements of c. 1103, a person may suffer such consternation as to become incapable of the process formed by the sequence of motivation, deliberation, choice, and execution of the consent other than in terms of interior self-alienation such that we cannot recognize that act as proper to the person, that is to say, as an act proceeding from the person's free will. Starting with the premise that it is not normal for a person confronted by some internal or external events to suffer such interior shock as to seriously lose self-mastery over his or her voluntary acts, the psychic cause may or may not produce, from the juridical point of view, a lack of sufficient use of reason at the moment of manifesting the nuptial sign, or a

serious defect of discretion of judgment, or an inability to assume. The facts may show a real psychological fragility which may not, however, constitute a psychopathology statistically verified by psychiatry. However, faced by an evident loss of freedom by reason of the interior consternation, the interpreter should proceed to examine the reasons for the existence of this anomalous fragility, its relation to the internal facts (the perceptions, sensations, feelings and emotions that caused the perturbance) as well as to the external facts, and then try to determine which aspect of the party's rational freedom of consent has become affected causing its lack (that is, the three causes of nullity under c. 1095, the aspect of sufficient use of reason, or the aspect of the needed proportionality between discretion of judgment and the mutual giving and accepting of the rights and duties in establishing the bond, or that other aspect consisting of a person's ability to oblige himself or herself to those duties). In short, the lack of internal freedom is indeed a psychic cause which, however, can be included within any of the paragraphs of c. 1095 depending on which particular aspects of free wilfulness of consent was, in fact, deficient.

The same should be said about so-called *affective or emotional immaturity.* If it does exist, this condition may or may not cause a defect of capacity although it is rare, but not impossible, for situations of emotional or affective immaturity to deprive a person of sufficient use of reason. Experience shows, however, that a connection frequently exists between emotional immaturity and a person's fragile self-mastery in the use of freedom; a person's lack of control of his or her disproportionate, unstable, or contradictory emotions may often reach a point of depriving one of that self-mastery needed to give and to accept the marital right-duties, or to assume one's own future as spouse in terms of future obligations. If that occurs, the condition can be included within c. 1095 as a serious defect of the discretion of judgment if the immaturity affects the capacity to establish the bond here and now, or as an inability to assume if the immaturity deprives the subject of the capacity to project the conjugal duties towards the future. In this second eventuality, immaturity prevents the person from perceiving and living in any other time but the present moment, thus being incapable of the continuity and of the power needed to persevere into the future, which the act of assuming the essential duties requires; that is to say, the requirement of the act of *assuming* to include the future implementation of those duties as a real possibility of his or her present will.

In regards to the old question of *lucid intervals*, the matter should be resolved under the light of that distinction to be made between psychic causes and causes of nullity implied in the text of c. 1095. A lucid interval is not part of the juridical notion of consensual capacity, nor is the expression unanimously accepted today by the medical sciences as a clinical condition susceptible of diagnosis and prognosis. We need, then, to remember those aspects of the voluntariness of consent and of marriage as object of consent. From the point of view of sufficient use of reason for the act of forming the nuptial sign, the degree of voluntariness that is

required at the moment of consent renders irrelevant the fact that the person may be enjoying a lucid interval, since the person with that sufficient use of reason would be perfectly capable of the act of consent. However, matters are quite different when it comes to evaluating the intermittence of the psychic cause in relation with the other two nullity grounds of c. 1095. Certain intermittent anomalies are perfectly compatible with a contracting party's required discretion of judgment and capacity to establish a marriage, while in other types of intermittent maladies the person going through a lucid interval may still not be able to attain the required degree of discretion of judgment. However, the notion of intermittence and lucid intervals collides directly with the continuous and permanent (not intermittent) character of the essential conjugal duties to be mutually assumed, so that when the psychic cause does disable a persons from the power to assume, here and now, a future without any intermittence in the real possibility to fulfil the essential conjugal duties, then we are facing a consensual incapacity as included in c. 1095,3°.

h) *The requirement of antecedence and pre-existing psychic cause and its significance in the assessment of incapacity*

In a certain sense, consensual capacity means that a person possesses at the time enough energy of the will to effect the "big bang" of marriage. It consists of giving rise to a principle, essentially complete yet chronologically at an early stage of development, so that, once a marriage has been initiated, it no longer requires any other generating moment or contributing factor. For the marriage *in fieri* is the generating principle that contains the essence and existence of marriage *in facto esse.*

Understanding the meaning of the *in fieri* is the key to determining the moment of the capacity or of its defect and, moreover, the decisive issue of the antecedence of the cause of nullity with regard to the foundational moment of the validity of the marriage. Specifically, this requirement that the consensual incapacity precede that moment, can be summarised by the three following rules:

First rule: one's sole concern should be that of evaluating whether consensual capacity existed or was lacking at the chronological moment in which consent was given. For that is the only act and moment capable of generating the entire structure essential to marriage.

Second rule: consensual capacity is not required to continue when the marriage has been validly established, consequently, any psychic dysfunction or mental illness that may occur after the valid establishment of the marital union has no power to destroy the validity of the marriage. On the contrary, the obligation for the spouses to remain together stems from the rights and duties of mutual assistance, service, and committed partnership inherent to the end of their common good (regarding those ends, see commentary to c. 1101).

Third rule: common to the three criteria for measuring of consensual capacity of c. 1095 is the principle that the lack of said capacity can invalidate the marriage only if it exists at the chronological moment of in which the act of giving consent takes place. In other words, the required antecedence is not of one type for the insufficient use of reason, and of different type for the inability to assume the essential duties. More specifically, one must be suffering an inability to assume at the moment of contracting because, as we saw above, it is irrelevant in terms of nullity if it had been generated by the unsuccessful dynamics of marital life, even when such unhappy common life may cause one or both of the spouses to suffer psychic disturbances.

Furthermore, it is useful to note that, for a person endowed with a normal psyche, a valid marriage is, in itself, a good which cannot occasion any psychic dysfunction. In the examination of each case, one should shun the simplistic recourse of attributing any psychopathogenous factor to the matrimonial institution. Objective experience drawn from a painstaking and genuine investigation of the facts in each particular case shows that personal disorders, on the part of one or both spouses, with the marital interaction that may have aggravated those disorders, are the causes for the misery and discontent of their common life. Precisely because their relationship did not correspond to the expectations of a good marriage caused frustrations and tensions which may have produced, by way of reaction, psychopathological dysfunctions and sufferings in one or both spouses. However, an unhappy and psychologically anomalous marital relation does not imply a null marriage, unless one of the contracting parties had already been suffering the psychic cause of such distress by at least at the time of consent, and when such an *antecedent* anomaly had influenced the contractual act in terms of causing an insufficient use of reason, a serious defect of discretion of judgment, or the inability to assume the essential duties.

10. *Rules for determining incapacity and the expert's report*

The juridical character of the notion of consensual capacity and of the ways of measuring its defect implies a distinction between the assessment of the defect of capacity, which is the cause of nullity in the strict sense, and the assessment of the psychic cause, which is the situation of fact that may or may not cause the juridical defect. Between the two notions there is an essential difference as well as a causal nexus, as already seen, because consensual incapacity needs to be supported by a psychic cause that explains it. This is the canonical scenario in which the proof of incapacity is to be examined and, especially, the assessment of the psychiatric expert. The following practical rules should be taken into account:

First: proof of consensual incapacity requires, above all, definition of the psychic nature of the cause, as it may affect each contracting party, by offering proof of its nature, its concrete effects on the contracting party, and its antecedence to the wedding.

Second: it is essential to prove the specific nexus of proportional causation between the cause of psychic nature and the defect of consensual capacity being invoked as the cause of nullity. This requires to specify the juridical aspect of voluntariness of which the contracting party has been deprived, and to determine the specific content of the nuptial sign that has been affected, or the specific right-duty (in singular or plural) over which the party lacks capacity to give and accept, or to assume.

Third: the proof must offer the person's biographical data and its chronological sequence, and it should demonstrate the areas of personal, conjugal, family, social, and occupational activity affected by the psychic cause. This is to be done by proving specifically, as facts, the actions, the conduct and the behaviour that evidence the incidence, as well as the degree, of the psychic cause on the person's capacity.

Fourth: the expert's proof should be logically inserted within the factual and chronological biographical account, which means that the alleged psychic causes need be offered together with their vital manifestations and not just as technical data copied from the expert's report; it also means that, unless appropriate arguments are given, the expert's report drawn during a suspect or litigious time must not contradict the facts contained in other documentary proof, including the confessions of the parties and the testimonies of witness, and especially the testimonies of those persons who had been close to the party during the different stages of his or her life. Indeed, "if nothing more is done than a descriptive analysis of the different ways of behaving, without seeking their dynamic explanation and without attempting a comprehensive evaluation of the elements which make up the personality of the subject, the analysis of the experts leads to one single predetermined conclusion. In fact, it is not difficult to see within the contracting parties infantile and conflicting aspects, which in such a situation become inevitably the *proof* of their abnormality. It may, in fact, be a case of persons who are substantially normal but who have difficulties which could be overcome were it not for their refusal to struggle and to make sacrifices".[4] Hence the probative importance, because of their contextual congruency, of those events that have occurred at a unsuspected time and have left a clinical trail of testimonies and opinions of doctors, psychologists, or psychiatrists.

Fifth: when there is no real possibility of proving the psychic cause and its nexus with the defect of capacity in a biographical and chronological sequence, proof should be offered about the reasons why that has not

4. JOHN PAUL II, All., January 25, 1988, cit., *ibid.*, p. 1183.

been possible. Doubtless, in those situations the reports contributed by the parties of the case and those by an expert appointed by the tribunal itself, become very important, due to the lack of other probatory means, but those reports should be offered with the knowledge that the examination of the person and the experts' reports are not sufficiently supported by eyewitness testimonies about the person's actions and behaviours when those events occurred. The judgment about the antecedence and the causality of the psychic cause in relation with the alleged lack of capacity must be carefully reached in those situations because it often happens that, towards the end of a stormy relationship, dysfunctions and imbalances of many various types appear in the spouses' psyche, and those anomalies cannot be gratuitously and without further qualification attributed to the *in fieri*.

Sixth: it is not the experts' function to determine the cause of nullity, but to confine their work to the diagnosis, aetiology and prognosis of the psychic cause. *The assessment of the defect or existence of capacity, as cause of nullity, is a juridical evaluation that concerns the judge alone.* It is, then, inappropriate to ask the expert to directly pronounce on the existence or inexistence of sufficient use of reason, discretion of judgment, or inability to assume because such expressions have a canonical meaning which have no corresponding clinical meaning and, even if the expert may know their juridical significance of the terms, the judge is the one who continues to evaluate the existence or non-existence of the cause of nullity. From this it follows that the judge -in principle- can decide in favour of a defect of capacity according to c. 1095 without the assessment of the expert which may not even be part of the acts of the case. However, except for the impossibility of obtaining the clinical assessment, it would be imprudent of the judge to do without the expert's valuable contribution.

Seventh: the application of any of the causes of c. 1095 without evidence to prove the failure of common married life *due precisely to the specific antecedent incapacity invoked* (especially when it is been about the serious defect of discretion of judgment or of the inability to assume the essential marital duties) indeed offends common and juridical sense. Perhaps in such a case it would be advisable to reconsider the judicial evaluation, in order to specify better the weight of proof necessary to overcome the presumption of c. 1060, and possible gaps in the instruction of the case.

1096 **§ 1. Ut consensus matrimonialis haberi possit, necesse est ut contrahentes saltem non ignorent matrimonium esse consortium permanens inter virum et mulierem ordinatum ad prolem, cooperatione aliqua sexuali, procreandam.**

§ 2. Haec ignorantia post pubertatem non praesumitur.

§ 1. For matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation.

§ 2. This ignorance is not presumed after puberty.

SOURCES: § 1: c. 1082 § 1
§ 2: c. 1082 § 2

CROSS REFERENCES:

COMMENTARY

Pedro-Juan Viladrich

I. DOCTRINAL PRESUPPOSITIONS COMMON TO CC. 1096–1100

1. *The conjugal choice and the process of forming marriage consent*

Matrimonial consent has a time of manifestation and a time of formation. Manifesting consent takes but an instant; forming consent is a process of generating it through a time period in the life of the spouses-to-be. Manifestation and formation of consent are not impenetrable time compartments but different moments in the person's one biographical process. The manifestation of consent culminates the prior stage of forming it, and for this reason, the elements that control a particular manifestation of consent, be they normal or not, are most often generated throughout consent's formative process. *A careful examination of the concrete formative process of marriage consent is, therefore, of fundamental importance in order to attain certainty concerning the validity or nullity of any matrimonial case.* This is applicable to all grounds of nullity and is particularly useful for those situations contemplated in cc. 1096–1100 in which the formation of consent follows a distinct sequence, namely a process by which the intellect offers to the will the object of consenting.

In reference to the contribution of the intellect to the formation of matrimonial consent, we should first note that the "choice of spouse," which is the core of the formative process of marital consent, consists of a two-fold choice: choosing the particular person and choosing marriage with that person—"I want to marry you". It is rather evident that in order to form that two-fold choice, a person must have a true knowledge of the particular future spouse and of the particular union one wishes to establish—"I know I want to marry you". *Consequently, at the core of the process of forming marriage consent (the volitional dimension) there takes place a process of maturation of knowledge (the intellectual dimension) about the spouse-to-be and about the matrimonial institution.* The very purpose and meaning of that time period which in ordinary language we call "courtship," and of the corresponding pastoral preparation for marriage, is to acquire the sufficient degree of knowledge necessary to be able to consent to marriage.

Taking one step further, we should add that, while regulating the relations between intellect and will (i. e., between knowing and willing), cc. 1096–1100 define *the nucleus of the true matrimonial object which the intellect offers to the will* so that the contracting party may be able to will what he/she knows and, by willing it, he/she may effectively give a valid existence to marriage. This also implies that those canons protect the process of "conjugal choice" (by which one wishes to be united in marriage) in so far as this is a process of acquiring and attaining a measure of true knowledge about the future spouses and about marriage, that is to say, a knowledge about the concrete object intended by the act of consent. This knowledge is the specific contribution of the intellect which is needed for a true voluntary decision to exist.

2. *Particular marital goods protected by the canons*

In each canon which typifies the cause of nullity, there exists in itself the defense of a particular aspect of the canonical notion of marriage. By articulating this particular aspect of marriage, whose absence precisely constitutes the nucleus of the cause of nullity, the doctrinal basis of the cause of the nullity is identified. In this way, the code avoids the risk that, in the process of studying the pathology of consent that teaches what marriage is not, we may forget what marriage actually is. While delineating the type of ignorance, error, and deceit that cause the nullity of marriage, cc. 1096–1100 protect the juridical good implied of the nucleus of true knowledge that ought to be correctly generated and attained by the process of forming the "conjugal choice". Since this is the nucleus of true marital knowledge that must be intended by marital consent, it is an essential part of valid consent. From this perspective, then, the legislator shows, *sensu contrario* through the invalidating effects of cc. 1096–1100, a very important aspect of the canonical notion of marriage, namely, that *the marital*

union is also a union through knowledge and for this reason, the validity of the consent requires a foundational core of true conjugal knowledge.

The community of life and love that expresses the truth about marriage involves an essential relationship of true reciprocal knowledge. The spouses' mutual self giving and acceptance in marriage consent implies a mutual recognition, and their mutual communication of life and love within the bosom of marriage involves also mutual knowledge. At the moment of establishing marriage, in order for a valid consent to exist, it is enough that there exists an authentic minimal core of conjugal knowledge. This initial amount of knowledge is sufficient when, although minimal, it contributes to the will of the contracting parties a primary conjugal meaning. But this initial amount of conjugal knowledge, although minimal, needs to be authentic in order to give rise to valid marriage consent. Throughout the particular vicissitudes of each married life, the spouses can develop that true embryonic knowledge which is enough to bring into existence their conjugal life. This can be in different degrees of knowledge and intimate identification; but this does not need, not even to reach its highest peak, to establish a new consent for their marriage. It is enough to have made that initial amount of knowledge to develop.

From this perspective, we can now better understand that canonical marriage is not an external social institution which, being extrinsic to the human person, consists of an impersonal allotment of roles mere result of necessities and of the conditions of the changing socio-economic and cultural forces among persons. Nor are the persons getting marriage regarded as isolated individuals dimly hoping that fate, rather than the very truth of the marriage institution, may provide them with a good companionship. On the contrary, marriage is, from its foundational moment, a vital project of intimate and mutual recognition of the spouses in the truth of marriage: the aim of knowing each other in order to love each other, and of loving each other to know each other *in truth* is an essential dimension of marriage seen as an intimate community of life and love due to both of the spouses in justice. This is one of the reasons, and not the only one, why canonical marriage is an interpersonal communion between the spouses. The identification and promotion of the notion of marriage that characterises canonical tradition is one of the aims that underlies cc. 1096–1100 and which should be used as the hermeneutical key to interpret these canons. This is the notion that marriage is a life-long project of progressive growth in the spouses' reciprocal conjugal knowledge which, developing from a embryonic nucleus of initial truth, has to be differentiated from those other unions that lack the initial core of conjugal truth because of ignorance, error or deceit.

3. *Common hermeneutical criteria*

Before examining each canon, and in particular cc. 1096–1100, it seems opportune to point out some common interpretative presuppositions.

a) The fundamental reason why consent is the only efficient cause of marriage resides in its nature of voluntary act. In other words, the act of the intellect does not, by itself, contain the efficient force of consent; this efficient power is contained, rather, in the act of the will. Consequently, *all those anomalies, limitations, and deficiencies of the intellect which, accompanying the generation and manifestation of a particular consent, do not affect the will and, consequently, do not irremediably impede or corrupt the wilfulness of the act, are legally irrelevant.* The text of cc. 1096–1100 refers to the intellect and its anomalies on the basis, however, of the principle that those anomalies never invalidate consent by reason of their being anomalies of the intellect, but only by reason of seriously hindering or corrupting the wilfulness of the act of contracting and only in such cases because the efficient cause of marriage is not the intellect but the will.

b) The fact that a deficiency or anomaly of the intellect may not affect the wilfulness of the act in some cases but irremediably ruin it in others implies, on the one hand, that in the structure of the human act there is, without any doubt, a relation between the operations of intellect and will so that the latter cannot act without a communication from the intellect; it implies, on the other hand, that between the proper object and function of each faculty, the relationship is not always necessary and concurrent because there can exist many deficiencies in the act of the intellect which, in fact, do not impede the full wilfulness of a particular act.

The human will possesses a dosage of independence vis-à-vis the acts of the intellect and in relation to those objects which, acting as motivating appetites, operate more through the medium of the bodily senses and less through the intellect. The human being is free to act against his or her ideas and desires without any hindrance or decrease of the wilfulness of the act (and some times even increasing that wilfulness). Also, from the perspective of the knowledge that precedes the act, the person continuously becomes involved in vital voluntary choices that normally take long periods of time or even a lifetime to be realised (choosing a profession, having a child, getting married); that is to say, the person becomes identified with future realities about which one cannot possess a full and perfect knowledge at the moment of choosing voluntarily. If the wilfulness of an act were to necessarily depend on a full and perfect knowledge of the object wanted, the human being, who is in continuous process of becoming through the passing of time, could never act voluntarily. *For this reason, the wilfulness of the human act is compatible with the imperfect and partial knowledge of the object chosen.* In short, matrimonial consent

understood as the contracting party's act of the will that causes a marriage to exist can be a perfectly voluntary act even when the party's knowledge of the marital object may, at the same time, be imperfect and partial.

c) The reason why the will has a certain *dosage* of independence from the intellect is that human beings become differently implicated in the act of their intellect or in the act of their will. This is of decisive importance for the understanding of the relationships between intellect and will in the formation of valid consent according to canonical doctrine. The act of the intellect, even when it elaborates a true concept, is not the thing known but only a fitting idea of that thing. Besides, true ideas perfect a person's intellect but not necessarily the person as such, for the human person is not identified with his or her ideas and is not perfected, therefore, by those ideas but rather by his or her voluntary acts. The will, however, implicates the person to become the subject or master of his or her own acts, for by the power of the will, the human being becomes so involved in the action as to be its author, its master and the one responsible for it. This power of becoming an intrinsic part of one's own acts, as their author and as the one responsible for them, is what we call "will," and the manner of being involved in the act as its original author, master and the one responsible for it, is what we call "wilfulness of the act".

In that sense, while the intellect elaborates ideas that are different from the thinking subject, as well as from the object thought, the will is the faculty by which one becomes part of one's own acts. It is a power, one may say, to turn a biography into an autobiography. While the truth of an idea consists of its adequacy with the thing without the subject becoming the thing itself, the wilfulness of an action is not the adequacy between the person's psychological experience (self awareness) and the action and without the subject becoming the action itself. This is why a person's *psychological awareness* of the wilfulness of his or her acts, in so far as that awareness is an act of the intellect, is not to be confused with the *wilfulness* of the act itself (cf. c. 1100). The latter, rather, is that intrinsic and substantial quality of an act by which the act is my own, and by which I am the author, master, and the one responsible for it, since it is *I acting*. The will is the faculty by which I become, in and by myself, the owner or master of my own acts.

d) For a person to be able to originate such a wilful act and to know that it is *oneself acting*, the person needs a certain prior knowledge of the intended object. Without that prior knowledge, the author of the act cannot be aware of being implicated in the act as its author and as the one responsible for it. The intellect is the faculty that offers to the person the necessary knowledge of the object intended and, in this sense, there can be no wilfulness in an act without a prior knowledge of that object: *nihil volitum quin praecognitum*. However, the intellect can not offer a perfect and complete knowledge because it is not the thing itself; it is sufficient for the intellect to present only an essential nucleus of the concept of that

thing. On this cognitive presupposition, even if minimal but true, the will can entirely implicate the person in the action, if the will so wishes, in such a way that the action is not more or less his action, and the person is not more or less responsible for it in relation with the dosage of truth of the object presented by the intellect. Rather, *the act is totally the person's own act and the person is fully responsible for it.*

The distinction between the object that is imperfectly known but perfectly willed is fundamental in canonical teaching about the contribution of the intellect to the act of the will in the formation of marriage consent. The distinction is based on the will's independence (freedom) from the intellect, which allows the person to be implied entirely in an act (full wilfulness) known only partially by the intellect, although truly (minimal but true knowledge). While the truth of the intended object, as known by the act of the intellect, is partial and imperfect, the wilfulness of the action, as "my action," can be whole and complete. Such is the meaning of the so-called perfectly elicited act of the will. In short, matrimonial consent, as act of the will, needs the prior intellectual contribution of the intended object which, known as a concept, should contain a minimal nucleus of true knowledge about the future spouse and about the matrimonial institution. If that minimal core is lacking, the person cannot be implied in what the intellect cannot not offer; if it is erroneous (not true), the person cannot recognise the act as his or her own because it is not the object known, even though he or she may be externally imputed with its authorship and responsibility; if the contracting parties possess the essential nucleus of true knowledge about themselves and about the marital institution, the remaining imperfections, things unforeseen anomalies, and deficiencies in their knowledge are irrelevant, because they do not impede in any way the complete wilfulness of marriage consent. It is the legislator's role to define, in accordance with divine natural or positive Law and with the aid of jurisprudence and doctrine, the essential core of true matrimonial knowledge as well as those situation in which that true knowledge may be lacking or may be corrupted thus being the cause of the nullity of consent.

4. *Types of ignorance and error and their terminology*

When introducing the common hermeneutic criteria for cc. 1096–1100, we have emphasised that, from the viewpoint of the contribution of the intellect to the will, the process of "conjugal choice" is the marrow of the formation of consent (see above, no. 1) and that this process contains a double sequence: the choice of the particular person as spouse, and the choice of the matrimonial institution ("I know I want to marry you"). The object that the intellect contributes in each sequence is, on the one hand, the knowledge of the other person as spouse-to-be, and on the other hand,

the knowledge of marriage as the specific institution that one desires to establish. At the moment of contracting validly, those two sequences are integrated in one consent ("I give myself and I accept you as spouse"). During the process of formation of that "conjugal choice," however, the two stages are not synchronised and each one can be affected by ignorance and by particular errors.

Depending on whether error affects the choice of the spouse or the choice of the matrimonial institution, we ought to distinguish between error of fact (*error facti*) and error of law (*error iuris*). In turn, the error of fact can affect the person's physical identity (directly or indirectly through a quality that identifies the physical person) or the spouse's qualities and, in the latter case, the error can be simple (irrelevant) or qualified (invalidating) which is subdivided in plain or proper (the subject is responsible for the error) and deceit or fraud (the subject is not the malicious cause of the error). The error of law can refer to the substance of marriage or it can refer to a quality of marriage (unity, indissolubility, sacramental dignity).

Canonical doctrine makes use of the category known as obstative or substantial error which comprises the error about the person's identity and the error about the nature of marriage: in both situations there lacks that minimal cognitive element for wilfulness to exist. Contrariwise, the error which does not affect the substance of the marital object is the so-called error-vice or accidental error which, involving a mistake only about the qualities of marriage or of the spouse, it allows for wilfulness. Accidental error does not invalidate consent (simple error) unless it gravely affects the marital object desired by the will of the contracting party (qualified error).

Finally, within the general category of accidental error, the distinction is made between antecedent error (or *error causam dans*) and concomitant error. Antecedent error is the one that, appearing before the act of will, is characterised above all by referring to a quality that was the main motivation for the person to resolve to contract marriage, and to such a point that, had the contracting party known the truth about the quality, he or she would not have thought of marrying and would not have resolved to marry. Concomitant error is that which, appearing chronologically alongside the act of consent, refers to a quality that was not the main motivation for marrying so that, had the party known the truth about the quality, he or she would have still married. In order to better understand the traditional discipline contained in the previous distinction, one must remember that *to consent*, seen as an act of the will whose object is to mutually give and accept each other, here and now, in marriage (cf. c. 1057) is not to be confused with the motives that lead a person to consent, even with those that may be said to be the principal and stronger motives, nor with those acts of will which, being voluntary decisions, refer to the consent to be given in the future and do not constitute consent in the present

tense. Keeping those distinctions in mind, one must not forget either that a motivating quality can go through the entire process of forming a particular consent and become a principal part of the direct object of the will to marry in the present tense, in which case, the error on that quality that has become inlaid in the object of consent will affect the integrity of consent itself.

Having seen the common presuppositions, let us now proceed to consider the specific content of c. 1096.

II. MINIMAL KNOWLEDGE NEEDED FOR VALID MATRIMONIAL CONSENT (C. 1096)

1. *Presuppositions contained in the norm*

In c. 1096 § 1, the legislator formulates the minimal amount of knowledge about the matrimonial institution that the contracting party must have in order to be able to give consent. As we have already said in the previous pages (see above, I, 3, a), the efficacy of the act of consent resides in its being a voluntary act. The will, however, is in itself blind and needs the prior contribution of the intellect, which is the faculty that provides that knowledge, even if minimal, concerning the nature of marriage. Without this contribution of the intellect, the will cannot determine itself in a conjugal direction because, lacking the minimal apprehension of the object, it cannot move itself toward it. Canon 1096 § 1, therefore, presupposes the intervention of the intellect in the formation of marriage consent and its contribution of the *cognitive element needed* to the wilfulness of the act of contracting marriage. This follows the classic principle that *nihil volitum quin praecognitum* which implies that, lacking the minimal knowledge of marriage, there is an impossibility for the will to elicit an act of marriage consent rather than a vice or anomaly of the act of consent, because there is a total absence of conjugal object to consent to. This is the specific literal meaning of the canon which states that for matrimonial consent to exist, "*it is necessary that the contracting parties be at least not ignorant* ..." This impossibility to consent, because of lack of matrimonial object, can be originated by ignorance or by substantial error either of law or of fact. Ignorance and substantial error of law are formulated in 1096 § 1, while substantial error of fact (error in the person) is properly contemplated in c. 1097 § 1.

Ignorance and error are different types of anomalies of the cognitive function of the intellect, but they coincide in producing the same invalidating effect. Ignorance is the complete absence of knowledge, or lack of the minimal knowledge needed for the wilfulness of consent to have an

object; the contracting party who is ignorant may be or may become aware of being ignorant. Error, on the other hand, implies a cognitive content and a false judgement or a mistaken estimation of marriage, but when this cognitive content is so false as to involve the minimal knowledge about marriage, a complete lack of matrimonial object follows and consent is then impossible. Contrary to the situation of the person who is in ignorance, however, the person in error is not aware of the error because she or he is convinced of being right.

In spite of all those differences, canonical doctrine understands that ignorance and substantial *error iuris* coincide in their practical effect. The reason is the following: the person who ignores the nature of marriage is either devoid of any knowledge about it or fills that vacuum with a substantial error. In either situation, the person lacks the prior cognitive element needed for marriage consent which, therefore, cannot exist. In turn, when somebody errs substantially on marriage, a fundamental ignorance about it underlies the error and the person lacks, for all practical effects, the necessary cognitive element needed for consent to exist. *Consequently, it is necessary to understand that, although the literal tenor of c. 1096 seems to refer only to ignorance, the canon also includes the substantial error of law.*

2. *Defining the minimal amount of knowledge needed for a valid marriage*

The key to this canon is the definition of the minimal matrimonial knowledge on the part of the contracting party. For the correct interpretation of the canon, it is very important to realise that in this norm, the *legislator refers to the intellect* as it offers its cognitive contribution to marriage consent. The legislator's intent is to define, in the most exact possible way, the minimal cognitive contribution of the intellect that is needed for marriage consent to exist. The legislator does not in any way intend, in this canon, to define marriage as the object of the act of will and, in this sense, *there is no collision among the definition of marriage in c. 1055, the definition of the object of the consent, as act of will, of c. 1057 § 2, and the formulation of the cognitive minimum of c. 1096.* As we saw (see above, I, 3), the intellect is in some ways independent from the will and both intellect and will address the same object in different ways: through the act of the intellect, the person cannot apprehend the thing in itself but only its concept (which, being true, is always incomplete in relation to the thing itself). Through the will, however, the person can be implied entirely in the object as its author and as the one responsible for the act. Canon 1096 does not seek to define marriage as the object of that act of will of the contracting parties by which the parties become spouses, totally and entirely; the canon seeks, rather to define only the

minimal contribution proper of the intellect, for marriage consent requires only a dosage, although an indispensable one, of true knowledge for the act to be perfectly and fully efficacious. And so, one can easily understand that that minimal knowledge is sufficient, that it cannot be mistaken with the content of the cc. 1055 and 1057, and that no contradiction exists among the definitions of all those canons.

It is important to add, contrary to what is oftentimes affirmed, that minimal knowledge does not mean confuse, vague, obscure or undefined knowledge, frequently these are the characteristics in which ignorance or the substantial error of law are manifested. Rather, it ought to be explained that, in the first place, the traditional expression used by c. 1096 § 1 ("*it is necessary that the contracting parties be at least not ignorant* ...") refers to that minimum which is not a discursive and conceptual type of knowledge and, by no means, a technical one. It is not a knowledge endowed with cultural, linguistic or grammatical quality in its expression. What matters is that the contracting party should possess that knowledge, even if he or she may not be able to expresses it with the terms that the canon uses to define that knowledge. The best way to discover if the person has that basic knowledge is not so much through words employed but through those *deeds* carried out by the party before, during and after the wedding. With that in mind, that knowledge consists, in the second place, of a minimal but lucid and precise cognitive perception of the substantial nucleus of marriage. Being a *nucleus* of knowledge, it is perfectible, throughout the matrimonial life, until reaching the necessary levels needed for the good progress of conjugal common life, but since it also ought to be *substantial*, this nucleus allows the bond to come to exist (for that is what validity means) from that initial moment. This nucleus is the minimal measure for both ignorance and substantial error of the law.

Consequently, the legislator understands that, for the validity or existence of consent, it is sufficient that the contracting parties should know that marriage is: a) *a consortium*, that is to say, a type of union that implies the spouses' possession of each other (*I take* this woman, she is *my* wife; *I take* this man, he is *my* husband) and the mutual sharing of their lives in a common fate and destiny; b) *permanent* in the sense of its continuous stability as opposed to merely sporadic, casual or transitory relationships, although a strict understanding of indissolubility is not needed; c) between *a man and a woman* in the sense that the conjugal union can only exist between persons of the opposite sex; d) ordered to the *procreation of the children*, since it is characteristic of this union the disposition to conceive and to take care of the offspring; e) *through some form of sexual cooperation*, an innovating and more precise expression, compared with c. 1082 § 1 of *CIC*/1917 and the debated issue about the degree of knowledge about attaining conception. The current discipline points out that it is sufficient for the contracting parties to know that, in order to

contribute to procreation, all that is needed is a conjunction of the parties' genital organs with no need of any other detailed knowledge of sexual intercourse. Ignorance or substantial error about any of these elements that compose the minimum object of marriage causes the impossibility of consent and, through it, the nullity of marriage.

3. *Presumption in favour of the existence of minimal knowledge after puberty*

Finally § 2 of this canon, establishes a legal presumption that the substantial nucleus of knowledge about marriage defined in § 1 is acquired by the time a person has completed puberty, although this presumption is *iuris tantum* and admits, therefore, contrary proof. With this presumption, the legislator confirms the nature of this minimal knowledge which consists of a knowledge of connaturality that each person is inclined to acquire about oneself by the time of becoming able to procreate. Being a presumption *iuris tantum*, the legislator accepts that certain personal situations may have impeded or deformed the person's innate knowledge on the substance of marriage. The burden of proof, however, is on the *puber*, that is to say, on the man or the woman who has matured to the bodily capacity needed for procreation.

1097 § 1. Error in persona invalidum reddit matrimonium.

§ 2. Error in qualitate personae, etsi det causam contractui, matrimoninm irritum non reddit, nisi haec qualitas directe et principaliter intendatur.

§ 1. Error of person renders a marriage invalid.

§ 2. Error about a quality of the person, even though it be the reason for the contract, does not render a marriage invalid unless this quality is directly and principally intended.

SOURCES: §1: c. 1083 §1
§2: c. 1083 §2

CROSS REFERENCES: cc. 126, 1055, 1057, 1098, 1101, 1102, 1104

COMMENTARY

Pedro-Juan Viladrich

1. *The issues and the rationale of this canon*

This canon regulates the different effects of the *error facti* when the object of the false judgement is either the *identity of the person* with whom one wishes to contract marriage or *the qualities* of the same person. Error pertaining to the person's quality is also regulated by c. 1098 which, however, addresses only the error caused by deceit or fraud (*see* commentary to c. 1096, I for the common hermeneutical principles).

Canonical tradition is unanimous in regarding the person of the contracting party as an essential factor of matrimonial consent because the *una caro* that defines marriage means that the marital union consists of an interpersonal relationship, or a union of persons in the unity of their natures. On the one hand, the person of each contracting party is *the subject* of the bond to be established by the efficient power of each party's will, which no other human power can supply (cf. c. 1057 § 1); on the other hand, each person (under his or her specific modality of man or woman) is given and accepted as *the conjugal object* of the irrevocable covenant that constitutes marriage (cf. c. 1057 § 2). This two-fold and inseparable presence of the person of each contracting party, as both subject and object of the essential structure of marriage, is the fundamental reason why an *error facti* either prevents the existence of marriage, when the error refers to the identity of the contracting party, or it affects the marriage in some other ways, even to the point of nullifying it, when the error refers to

certain qualities of the person. In the latter case, the present code acknowledges that the accidental error of fact produces an invalidating effect when the error refers to a quality directly and principally intended and when the error is one caused by deceit (fraud). By so doing, the code has innovated and restructured the former discipline.

In order to avoid interpreting the new grounds of nullity under the light of problems and solutions already superseded, we should recall, in a necessarily synthetic fashion, some important historical precedents that can explain the systematic rationale of the present discipline.

2. *Historical antecedents of the* "error facti"*: the debate over cases of error regarding the qualities of the person*

In relation with the substantial error of fact, c. 1083 of the 1917 code prescribed in § 1 that "error regarding the person renders the marriage invalid." Nevertheless, concerning the error of fact on the qualities of the person § 2 established a very restrictive norm: "Error about a quality of the person, even though it be the reason for the contract, does not render a marriage invalid unless: 1° this error about the quality of the person redundant in an error about the person him/herself [*error redundans in personam*]; 2° a free person contracts marriage with another person, believing to be free, but which is a slave, in the full sense of the word [*serva, servitute proprie dicta*]."[1] The legislator of the 1917 code enshrined in that canon two lines of long doctrinal and jurisprudential tradition: on the one hand, it accepted without reservations that the error regarding the person invalidates consent; on the other hand, the canon strictly preserved the rule that the error regarding the qualities did not in itself invalidate consent, even when being the cause of the contract; there were however two exceptions to the latter: first, the error pertaining to a quality which, being the only means to identify the contracting party, would rebound into a form of error of the person, and second the error pertaining to the servile condition of the party. This second one fell into disuse by reason of the successive disappearance of slavery.

A whole series of rather extreme errors of the qualities of the person, which wounded the most elementary sense of fairness, did not find peaceful accommodation in the narrow framework of c. 1083 of the 1917 code. That was the case, for example, of such predicaments as marrying a woman while not knowing, because of mistake or even deceit, that she

1. Original in Latin: 1083 § 1. Error circa personam invalidum reddit matrimonium.
§ 2. Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum:
1° Si error qualitatis redundet in errorem personae;
2° Si persona libera matrimonium contrahat cum persona quem liberam putat, cum contra sit serva, servitude proprie dicta.

was pregnant by another man, or of not knowing that she was not a virgin, or that the prospective spouse was sterile, suffered from a venereal disease, was a delinquent sought by justice, or that the person had other children, and so forth. Since it was not possible to include those situations into the *fattispecie* of the error of the person's identity or of the error of servile condition, the polemics and the doubts of interpretation, including those of jurisprudence, were centred around the meaning of the expression *error redundans in personam* and about the possible ways of amplifying the scope of that postulate.

Against that background, the rules devised by St. Alphonse Liguori[2] acquired special importance. Attempting to resolve long-standing disputes derived from doubts of interpretation of the texts of St. Thomas Aquinas and Thomas Sánchez on the matter, the rules of St. Alphonse defined three variants of *error redundans*. The first established that there is *redundant error* when the person's quality has the nature of a *condicio sine qua non* so that the absence of the condition would cause the failure of a marriage consent that had remained in suspense pending the verification of the condition. The second rule, derived from Sánchez's restrictive interpretation, understood that redundant error existed when it referred to a quality that served as the only means of physically identifying the person of the contracting party. Finally, the third rule established that if the party consented directly and principally to the quality and only indirectly and secondarily to the person, then the error of the quality rebounded into an error regarding the person, but if the party's consent referred principally to the person and only secondarily to the quality, then the error did not rebound into error regarding the person.

Although the third rule of St. Alphonse Liguori was taken into account by some rotal sentences, it did not enjoy widespread acceptance because of its alleged difficulties of determining, in actual practice, what the person had truly and directly intended when contracting. In fact, those difficulties stemmed from the deeper root of seeking the invalidating effect of the error regarding a quality directly and principally intended within the inadequate framework of the *error redundans* which was that, except for the servile condition, the error concerning a person's quality was considered irrelevant. However, a quality in the person of the contracting party, even if directly and principally intended, is not to be confused with that other quality that is the exclusive means of identifying the physical person of the contracting party; rather, an error about the identifying quality is one type of substantial error regarding the person and is outside the scope, therefore, of the mere error of quality. Not being a case of a quality that would identify the person, but one of error regarding a non-identifying quality, interpreters thought that the general principle that the error of a quality does not invalidate marriage should be applied, even when it had been the cause for

2. *Theologia Moralis*, *Liber* VI, *Tractatus* VI, cap. III, nn. 1014–1016.

contracting. This situation left the third rule of St. Alphonse Liguori in a no man's land and so canonical doctrine and jurisprudence preferred to resolve those extreme situations of error regarding a quality by including them, if at all possible, within the category of implicit condition and its widely recognised notion of conditioned consent.

After the Second Vatican Council and particularly soon after the rotal sentence *coram* Canals of April 21, 1970, the need to respond to situations of evident inequity forced a new and daring development. Since the discipline concerning the various errors on the quality of c. 1083 § 2 was definitively narrow and sterile, the concept of "person" in § 1 of the same canon was reinterpreted. Going beyond its meaning of referring to the physical identity of the contracting part, the term came to be understood as referring to the party's "personality"; that is to say, to that singular composite of existential, psychological, moral, juridical and social conditions and qualities which characterise a particular individual *(persona magis integre ac complete considerata)*. Experience, however, showed that this line of interpretation became a source of rather deplorable results. The new notion of person as "personality" meant that the object of the substantial error of fact was forsaken in a Tower of Babel of psychological, sociological, moral and juridical currents frequently in the hands of the ideologies in vogue. Under such confused and uncertain notion of "personality," situations that were simple errors, juridically irrelevant, found cover behind the extreme cases of error and deceit; the facts adduced would be, quite often, not even antecedent to wedlock but the result of the natural changes, not always positive and fortuitous, of a person's life; or they were even caused by the wrongful use of the initial possibilities of conjugal goodness of a valid marriage.

Apart from those examples of abusive interpretation, the most serious issue had to do with the interpretation of the error regarding the person in terms of error regarding the "personality," which carried the risk of diluting the profound marital meaning of *the body's sexual modality* and of displacing it from its primary rank as the identifying factor of the person. The loss of the perspective that the body in its sexual modality is the essential reference factor for regulating the different errors of quality, and the *substantial* "fattispecie" *of the error facti*, meant the loss of the necessary juridical safeguard of the contracting party's physical identity. By bringing down that supporting vault of canonical doctrine in order to accommodate some extreme situations, which clearly were errors of the quality, the whole canonical discipline of error was put out of balance. If the reason for such an assault on the notion of "person," in his physical identity, was to rectify the injustices derived from the restricted relevance of the error of quality in the discipline of c. 1083 § 2 of the 1917 code, the wise thing to do was to reform the rules of § 2 rather than forcing the configuration of the error of the person, as regulated with great precision in § 1 of the same canon following a solid and multisecular tradition.

That was, in fact, well understood by the legislator of the code of 1983 when sanctioning the present discipline about the *error facti*. In this regard, it is necessary to note that the current cc. 1097 and 1098 have not just extended the invalidating effect of the error of a quality to other situations, but they have also introduced a new systematic approach to the issue. This new system is inspired in the difference between substantial and accidental errors, which are different in nature and in their respective process by which the intellect presents the matrimonial object to the act of consenting; from that differentiation, then, derive the corresponding invalidating effects. Accordingly, the error of the person continues to refer exclusively to the physical identity of the person; redundant error disappears from among the errors on a quality, because it is understood to be a type of the error regarding the person, that is to say, a situation implying an error of fact on the substance; the error of the person's servile condition disappears, not only because of the disuse of that social condition but also because, in so far as the error involved deceit, the new discipline would include it in the invalidating error resulting from fraud (cf. c. 1098). Concerning the error regarding quality, the traditional principle remains that, in principle, it is irrelevant if the error consists of a failure to understand without causing, however, a substitution in the marital object of the will. However, the present system explicitly includes as invalidating the error regarding a quality directly and principally intended by the contracting party as *the object of consent*, and it defines the exact limits of those cases in which the error of a quality, caused by deceit, invalidates consent.

For a well-founded interpretation of cc. 1097 and 1098, it is crucial not to reintroduce in the reading of those canons the tendency, which today would be a prejudice and an abuse, of looking for the invalidating force of an error of quality by forcing the conceptual limits of the substantial error of fact. Nor should the error of a quality directly and principally intended be adulterated by attempting to fit into it some situations of simple error, or of failure of the marriage *in facto esse*, and by recourse to outmoded arguments which, apart from being totally ambiguous (e.g., error regarding "personality"), are no longer needed.

3. *Error regarding the person*

The text of c. 1097 § 1 prescribes that *the error regarding the person invalidates marriage*: the marriage is null when the contracting party, wanting to marry a certain and definite person, marries by mistake a different person. As we have seen above (*see above*, no. 1), the unique personhood of the contracting parties, in their conjugal aspect as male and female, are the substance of the matrimonial object of consent and the only subject of the marriage bond. Therefore, an error about the identity

of the person with whom one wants to contract affects the object in such a substantial manner that the consent to marry, in fact, is not produced and, by natural law, there can be no marriage.

a) *The identity of the person as the minimal element of cognition*

More than vitiating consent, the error regarding the person prevents its very existence. Since an error regarding the person refers to the substantial object, it amounts to ignorance or to error of the nature of marriage, for in those suppositions the intellect is not able to offer the minimal nucleus of true knowledge, about the contracting party or the marriage institution, that is necessary for the will to have a marital object on which to consent. We are dealing, therefore, with that *minimal prior cognition needed* for a voluntary act, in accordance with the rule that *nihil volitum quin praecognitum*. Although it may seem that, while c. 1096 § 1 specifies the nucleus of the minimal knowledge on marriage, c. 1097 § 1 is, at least, not explicit about the required minimal knowledge about the contracting party, but that is not so. Canonical tradition, mainly after the refined contribution of Sánchez to the understanding of the object of the error regarding the person, holds that the certain knowledge of the person's *physical identity* forms the minimal nucleus of knowledge about the person or cognitive presupposition needed to consent to a marital object. Consequently, there is error regarding the person when there is error regarding the person's physical identity. Paraphrasing the text of c. 1096 § 1, for marriage consent to exist it is necessary that the contracting parties be at least not ignorant of the physical identity of the person with whom they want to contract.

b) *Physical identity*

The criterion that the knowledge of the physical identity of the other contracting party is enough to exclude error concerning the person cannot be accused of being a minimalist solution not attuned to the interpersonal values of marriage. Rather, that criterion is well founded on the fact that the contribution of the intellect to marriage consent is a minimal nucleus of conjugal truth that is, however, sufficient to elicit the voluntariness of the act of contracting (*see* commentary to c. 1096). By means of their respective *wills*, the contracting parties are, then, able to mutually give and accept each other *entirely* as spouses, even though the same fullness characteristic of the self-giving and voluntary acceptance is not required on the part of the intellect's contribution, as only a *basic knowledge*, namely that of the physical identity, is sufficient to identify the person.

In order to avoid hasty interpretations, it is necessary to underline that knowledge of the physical identity, being only a nucleus of minimal conjugal knowledge, is however a knowledge of the substance of marriage. This minimal nucleus has, therefore, a profound personalist and matrimonial meaning which only a person who lacks awareness of his or her action can fail to value. We should remember that a person's identity cannot be known directly but through its manifestations only. The first is the person's own body which, besides containing and expressing the

personal and sexual identity in a certain and definite form, can be directly and objectively known by the contracting party. Indeed, *the body is the most certain means, as the law requires, of a person's physical identity, for the body is the first and most proper manifestation of each person's singularity* as it is animated by a personal spiritual principle. This personal body, in so far as it is endowed with *a feminine or a masculine modality,* is in fact the *conjugal* object given and accepted that confers *matrimonial* character to the consent between *a man and a woman.* The physical identity, therefore, also contains each particular person's sexual identity and whose particularity needs to be specifically determined because the consortium exists only between *this man* and *this woman* (cf. c. 1096).

We can then conclude that knowledge of the physical identity amounts to knowledge about the identity of the person. In summary, *there is error regarding the person when the contracting party errs about the physical identity (which includes the sexual identity) of the person with whom one intends to contract.*

c) *Error regarding a quality that flows over the person*

Although the canon does not say it *expressis verbis,* one must understand, without any doubt, that the so-called *error redundans,* or error rebounding on the person, has the same *invalidating effect* as the error regarding the person. The *error redundans* is not a type of error regarding the quality but one way of erring about the person's very identity. The error refers to *a quality that, replacing the unknown physical identity, becomes the person's identifying element.* Being a form of error regarding the person, the legislator has excluded it from the errors on quality (cc. 1097 § 2 and 1098) and has decided that any explicit and specific formulation of it within c. 1097 § 1 would be a mere pleonasm of the error regarding the person.

For redundant error to exist, the physical identity of one contracting party should be unknown to the other party while a quality or characteristic of the first party should take its place; and, in addition, that characteristic or quality should be so exclusive and so determining of the person's singularity (e.g., the first-born of a certain family) so as to be the only means to identify the person. If the quality were not to replace the physical identity in its role of offering the minimal cognitive presupposition to the intellect (because the physical identity was already known by the party), there would be no error rebounding or flowing over the person's identity but just a simple error regarding quality. It follows, then, that if the person's physical identity is unknown, the error about the exclusive quality that identifies the person is an error about the identity of the person and, therefore, invalidating, as would be the case, for instance, of one who mistakenly thinks to be marrying the first-born, which is a quality that identifies the person. In short, for *error redundans* to exist, one party *should be deprived of prior knowledge about the physical identity* of the person, and the *exclusive quality of the other party,* about which the first

party errs, should be *the only means of identifying the person* chosen as spouse. Since the error redundant is one type of error regarding the person, and since the cognitive element prior to wilful consent is lacking, the result is an *absolute lack of marriage consent* rather than a vitiated or diseased consent.

4. *Simple error regarding a quality with no invalidating effect*

In the first part of § 2 of c. 1097, the legislator has confirmed the traditional rule that a marriage is valid when the error of the contracting party refers to a quality that he or she mistakenly thinks to adorn the other party; the validity of marriage stands even if the quality, that was mistakenly thought to exist, had been the cause that motivated the resolve to contract—*etsi det causam contractui.* After establishing this rule of canonical doctrine, as a general principle about the error regarding a quality, the same § 2 acknowledges that error regarding a quality directly and principally intended has a diriment effect on marriage.

In order to correctly understand the general principle about the irrelevancy of error regarding quality, *etsi det causam contractui,* and in order not to confuse it with the error regarding a quality directly and principally intended or with the error caused by fraud, both of which being invalidating, it seems useful to establish the following considerations and rules of interpretation.

a) *The quality of a person seen as an accidental element*

The first consideration refers to the need to understand the *accidental nature* of a person's quality: any error regarding a quality does not refer, by definition, to the substance of the person's identity. The essential object of marriage consent is not the person's qualities, virtues, or defects, but the very persons of the contracting parties as a male person and a female person. In cases where there is an error regarding quality, the identity of the person is already known; consequently, apart from those situations of *error facti* included in c. 1097 § 1 (error regarding a person and its subtype, error redundant), from § 2 the legislator assumes that one contracting party has already acquired, through the long process of conjugal choice (*see* commentary to c. 1096, I, 1), the minimal cognitive presupposition of the other party (the identification of the person). This knowledge, as explained above, is the *specific contribution of the intellect that is indispensable* for the wilfulness of consent and for the interpersonal nature of the conjugal bond. In symmetry with the issue of the contracting parties' basic knowledge of marriage (c. 1096), the voluntariness of consent can be complete, on the part of the contribution of the intellect, when one party possesses the basic knowledge of the personal identity of the other party (c. 1097 § 1). The fundamental reason why error regarding quality is, in principle, irrelevant is that the contracting party, in

spite of that error, possesses a *sufficient identification of the person of the other party and the cognitive presupposition, therefore, for the wilfulness of consent needed for the act of contracting marriage.*

The formulation of this first rule must now be complemented by recalling that the will has a natural sphere of autonomy vis-à-vis the intellect (*see* commentary to c. 1096, I, 3) which explains why we are always able to want, with full voluntariness, someone or something only incompletely and sometimes even defectively known. It is in that manner, for example, that we love ourselves, our children, our friends, our occupation ... and that person we marry. Thus, a measure of error about another person's qualities is a common, if not a generalised, condition of the mutual knowledge of the contracting parties.

b) *The personal quality as a motivating factor* causam dans contractui

The second rule acknowledges the motivating force of the quality in the process of forming marriage consent. The rule, however, makes a radical distinction between the motivating force of the quality and the efficient power of the act of consent so that *the motivating quality, in so far motivating, is never the efficient cause of the bond, even when "causam dans."* The legislator takes into account the distinction between, on the one hand, all sorts of motivations, which are influential circumstances, as well as acts of the will through which the future contracting parties bring forth their relationship to the moment of proposing marriage for a fixed and agreed date and, on the other hand, that unique and original act of the will of contracting marriage, here and now, which is consent in the strict sense (*see* commentaries to chapter IV, title VII, and c. 1057 about motivation, and virtual and actual will). The legislator understands that consent is, always and in every case, an original act of the will with its own measure of freedom, contents, and independence from any motivation; an act, that is to say, independent from all the preceding acts of the contracting parties and from all extrinsic influences which, having motivated the parties *to want* to contract, *are different from the very act of contracting.* In this sense, then, the legislator declares that marriage consent remains autonomous, and that its object is substantially unaffected, even from a motive *causam dans contractui* which, in the process of proposing marriage, is the only motivating factor without which the contracting party would never had married.

Thus confirming the traditional principle about the irrelevancy of simple error regarding quality and regarding the quality in *its nature of motivating factor* in the resolve to marry the person, the legislator understands that a person's quality is as an *accidental element* and that error about it neither impedes nor invalidates the matrimonial substance of consent. With this regulation of the error regarding quality, the legislator avoids the risk that certain defects of knowledge, which in no way weaken the full voluntariness of marriage consent, may unreasonably produce

insecurity about the validity of the marriage bond, as could be the case with normal deficiencies of the parties' mutual knowledge or, perhaps more frequently, of the parties' exaggerated opinion of their virtues and qualities at the time of the wedding which do not, in truth, prevent the full voluntariness of consent. This discipline, likewise, protects the marriage bond from some bad habits, of one or both spouses, resulting from deplorable conjugal lives which frequently produce the psychological attitudes of the interpretative will ("had I known"). It is not idle to remember in this regard that *valid marriage is not a union between perfect human beings* but, quite the contrary, a communion in which each spouse is committed, by the very fact of validly being a spouse, to help the betterment of oneself and of one's spouse. Consequently, to argue that defects arising from or aggravated by conjugal life are causes of marriage nullity seems incompatible with that aspect of the conjugal good (cf. c. 1055) that is formed by the obligation to mutual help between two imperfect human beings, a duty that acquires a special firmness by reason of the sacrament.

Consequently, at the time of agreeing to marry and at the moment of contracting, a marrying party may have laboured under one or many errors on the qualities of the other party, and the errors may have escorted the person's consent, even though the person would not have changed the resolve to marry had he or she known otherwise (which would be a case of non-invalidating concomitant error). Again, the contracting party may have been motivated to marry by one single quality of the other party which, by reason of its power to induce the choice of this particular person (a case of non-invalidating antecedent error *causam dans contractui*), may have led the party to think, after discovering the error, that had he or she known the truth, he/she would not have married. This change in the person's resolve receives the name of *interpretative will*, which is not to be confused with the actual will to consent as elicited at the moment of contracting (the expression, "had I known *then*, what I know *now*, I *would* not have married," shows that the party's intent *now* is not what the real intention *was then*).

5. *Error regarding a directly and principally intended quality*

a) *Invalidating effect*

The second part of c. 1097 § 2 establishes that error regarding a personal quality invalidates marriage when, as part of the very object of consent, the quality is directly and principally intended (*haec qualitas directe et principaliter intendatur*). The legislator has formulated this cause of nullity inspired, as officially acknowledged, by the third rule of St. Alphonse Liguori (*see above*, no. 2) on redundant error and by certain more recent decisions of the Roman Rota on some extreme cases of error.

b) *Difference between redundant error and simple error*

In order to have a good grasp of this new ground of nullity, one should above all avoid two mistakes about the nature of this unique, diriment quality. First, its characteristic of being directly and principally intended does not mean that it rebounds on or flows over the person. If that were the case, its invalidating effect would be sufficiently included in § 1 of c. 1097 and therefore, its inclusion in § 2 would imply a needless repetition by the legislator. In addition, the confusion between the error regarding a directly and principally intended quality and the error redundant would deserve the criticism against the third rule of St. Alphonse which have placed that quality within the conceptual framework of redundant error; it would then be unacceptable to hold that a quality that does not identify the person could have a diriment effect, which is reserved only to the error regarding the identity of the person. From this differentiation between the direct and principal quality and the redundant quality, we can draw a first and important consequence that the error regarding a quality directly and principally intended is not an error regarding the person, neither direct nor indirect (or redundant); and consequently, in the case of the direct and principal quality, the party knows the identity of the person and has, therefore, that minimal cognitive presupposition. Hence, the error regarding a quality directly and principally intended presupposes the knowledge of the personal identity of the other contracting party and, consequently, the error redundant and the error regarding a direct and principal quality are incompatible concepts and cannot coexist at the same time.

The second mistake to be avoided refers to the fact, to be most vigorously emphasised, that the direct and principal quality should not be regarded as a mere *motivating* cause, for otherwise that quality, even if it were *causam dans contractui*, would be ruled by the general discipline on the irrelevancy of simple error and could not invalidate marriage without imputing § 2 of c. 1097 with inconsistency. After stating that the invalidating effect of this quality does not derive from being a motivating cause, we must now clarify whether or not the quality *causam dans* is the only one that may become, after some *accretions*, a quality directly and principally intended. In other words, is the condition implied in *causam dans* a necessary but insufficient requirement of the quality directly and principally intended? We do not think so because the literal sense of c. 1097 § 2, which ends with the clause "nisi haec qualitas directe et principaliter intendatur," refers to the quality mentioned first as "error in qualitate personae…" and not to the one referred to by the phrase "etsi det causam contractui." This interpretation is supported by the argument that in his third rule, St. Alphonse did not intend to attribute any invalidating effect to any motivating cause, not even to the *causam dans contractui*, but to that quality which, by reason of its direct and principal characteristics, forms part of the object of consent. While placing the quality within the

object of consent, St. Alphonse, however, classified it inadequately along with redundant error. The present legislator has acknowledged that a quality may, by the will of the contracting party, form part of the matrimonial object of consent, even though the quality need not be part of the contracting party's minimal cognitive presupposition. In other words, the quality need not identify the person of the other party. Then, if this direct and principal quality is not to be confused with a motivating cause, we should now ask what is the meaning of its being "directly and principally intended"? And, why an error about it invalidates marriage?

c) *The direct and principal intent on a quality in the process of forming consent*

At the bottom of the judicious formulation of St. Alphonse is his intuition that the link between the process of choosing a spouse and the object of consent can include more than the physical identity of the person. In fact, at the moment of choosing someone as a possible spouse, the process of selection is not limited to the mere identification of a person of the opposite sex; rather, as it is obvious, a person frequently knows many men or women who are not chosen as possible spouses just by the mere fact of identifying them. In the process of forming this assessment, in its development, and in its confirmation up to the decision to marry him or her, to the exclusion of any other, a whole series of subjective and personal assessments take place through which a particular person is desired as a future spouse. Those evaluations, which constitute the basis of the spouse selection, are composed of favourite qualities and of appraisements of the suitability of the candidate for the intended life-project of marriage and family. This type of evaluation is important because any subjective life-project is legitimate as long as it is not opposed to the essence and to the substantial ends of marriage. The adaptability of the objective ends to the subjective ones allows the future spouses to prefer certain qualities or aptitudes in the selection of the suitable spouse.

With that process of conjugal choice as background, we can see that the third rule of St. Alphonse, which the legislator has now adopted, holds that error about a quality does not invalidate consent when the real process of selection shows that the spouse has been directly chosen because of what he or she is and when this being himself or herself is the principal component of the object of consent. Therefore, when that object of choice prevails over any of the mistakenly perceived qualities which have accompanied the selection of the person as a suitable spouse, then, that quality does not directly and principally support the choice of that particular spouse; consequently, error about those qualities cannot invalidate consent ("si consensus principaliter fertur in personam et secundario in qualitatem"). In the opposite sense, a particular quality may be directly and principally intended, through that process of selecting a spouse, while the holder of that quality may be relegated to a secondary and indirect object of the choice, and in such a way that this prevalence of the direct and

principal choice of the quality over the choice of its holder may remain unchanged, through the long process of forming consent, and form the object of the very act of contracting; in that event, an error over the quality, directly and principally intended *instead of its subject*, invalidates marriage by reason of a *defective object of consent* because the subject, in so far as thought to be the holder of the quality, is only a secondary and indirect component of the object intended.

d) *The juridical nature of the directly and principally intended error is that of a substantial error of fact*

The key idea to explain the preceding statement is the following: in this error, *the will of the contracting party turns the intended quality into a substantive component of consent and thus, through the process of forming the very object of his or her consent, the party's will converts the quality into an element more directly and principally sought than the personal identity of the other party, which is not unknown to the first party.* Let us emphasize that the error regarding a direct and principal quality is a substantial error of fact. This is also the true reason for its diriment effect. By being directly and principally intended, within the object of consent of the first contracting party, the quality takes the place of the substance which properly belongs to the personal identity of the other party; then, the personal identity of the latter, although known by the first party, is relegated to a second and indirect position and is converted into an accidental element within the real object of the first party's will. This is not a redundant error because the contracting party knows the personal identity of the other party; nor is it an accidental simple error because the quality has become the substance of the matrimonial object and the personal identity an accidental element of the same object; neither is it a specially qualified error regarding quality by reason of its invalidating efficacy. Rather, the error regarding a quality directly and principally intended is a *true substantial error of fact.*

The transformation of a quality into the substantial object of consent cannot be produced spontaneously without the intervention of the will. The will of the contracting party wants that quality through the long process of forming consent and keeps wanting it in the act of contracting. Given the *wilful substantialisation* of the quality, the error about it can no longer be an anomalous state of the intellect irrelevant to consent because that error has, in fact, caused the disappearance of the substantial component of the matrimonial object, directly and principally wanted, in the very act of contracting. This is the reason why the legislator has judged that this type of error regarding a quality directly and principally intended invalidates marriage, in so far as the error determines the substantial contents of the matrimonial object.

e) *Proof of this error regarding quality and other related conditions*

The first practical difficulty is to distinguish the error regarding a quality directly and principally intended from the case of *interpretative will*. In this regard, we should understand that we are dealing with a *wilful substantialisation* of a quality; from this viewpoint, the corroboration techniques of the process that forms the will to simulate can also be used to verify the determining process of a will resolute to substantialise a quality. To that effect, it is crucial to analyse the period preceding the wedding, since the process of the mutation of the quality into the substance of the contract is a temporal process *linked, as cause and effect,* to the particular characteristics of the person's own biographical process, which may have started even before one party knew the other. The same process is also causally connected with the development of the parties' relationship, for the specification of the quality, as the direct and principal object, is one concrete and real aspect of the process of forming that relationship. In the second place, there should be a certain congruity running through the party's prior history, the moment of contracting, and the party's subsequent reactions when the error was discovered after having established conjugal life. The error regarding a direct and principal quality must have had a genesis and a persistence caused by the person's real and antecedent life history; it is also of great importance that this *antecedent and causal biographical substratum* be shown in the proof in order to, at least, distinguish it from the interpretative will. From the viewpoint of the sequence of the biographical antecedents, it is crucial to prove also the existence of the party's *positive, permanent, and not revoked will to substantialise* the quality as the will's direct and principal object, to the point of displacing the other party's personal identity from its substantive position to an indirect, secondary, and accidental place (which anyone else with that quality could also come to occupy). Once the antecedence of the condition is proved, the evidence ought to be completed by showing that the party's *reactions, concomitant with and subsequent to the wedding* and the discovery of the error, are congruous with the alleged antecedent condition

Since the source of the invalidating effect of the error regarding a direct and principal quality is the person's will, which is determined to substantialise an accident (i.e., a quality), it makes little sense to require that the quality be objectively grave, important, or transcendental. Demanding such an unfounded requirement often leads to the neglect of the required and decisive element of this ground of marriage nullity, namely *the positive and permanent determination of the will, up to the act of contracting, to directly and principally intend a quality and to substantialise it by converting it into the real matrimonial object.* Because of this, the legislator has intentionally and rigorously avoided to indicate the type of qualities that a contracting party could directly and principally intend. The

legislator, however, acknowledges the legitimacy of the subjective matrimonial project, as an expression of the party's free choice, as long as it is not opposed to the essence and to the objective ends of the matrimonial institution; for this reason, there is no room for important qualities, decreed by law, which could be acceptable for direct and principal substantialisation by the party's will. And that also means that *the special objective gravity of the mistaken quality does not convert it into a quality directly and principally intended, as an automatic effect of its importance.* The only cause of that substantialisation is the subjective will of the contracting party, and never the objective gravity or importance of the quality itself without the party's positive, persistent, and never revoked will.

With all of the above in mind, it is not difficult to conceptually distinguish between a quality directly and principally intended and a quality intended as a condition. In the case of the condition, the contracting party is in an underlying *state of doubt and uncertainty* and his or her intention is to keep the efficacy of consent *suspended* until the existence of the quality is verified, for here the quality operates as an unknown element. In error, however, the existence of the quality is thought to be certain and, consequently, the person *has no intention to suspend* the efficacy of consent. *The state of certainty about the mistaken appreciation of the quality seems to be the differential characteristic of error.*

6. *The retroactive effect of c. 1097*

Finally, it may be appropriate to add that the *retroactive* effect of c. 1097 seems doubtless because the legislator ascribes the invalidating effect, clearly based on the natural law, to the error regarding person, to the redundant error (as a type of error in person), and to the error regarding a quality directly and principally intended.

1098 Qui matrimonium init deceptus dolo, ad obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit.

A person contracts invalidly who enters marriage inveigled by deceit, perpetrated in order to secure consent, concerning some quality of the other party, which of its very nature can seriously disrupt the partnership of conjugal life.

SOURCES: None

CROSS REFERENCES: cc. 125, 219, 1057, 1097, 1103

COMMENTARY

Pedro-Juan Viladrich

1. *Notion and foundation*

For the general hermeneutical principles common to cc. 1096–1100, see commentary to c. 1096, I. For the first time, error of quality caused by fraud is, as stated in this canon, a source of marriage nullity. By fraud is understood any kind of lie, falsehood, trick, cover-up or machination intentionally contrived and perpetrated by a third party in order to confuse, deceive, cheat, defraud or lead one contracting party to error about a quality of the other party. Canonical doctrine differentiates between simple, accidental fraud, under which the contracting party would not have suspended consent, even if he or she had known the truth, and determining fraud (also called *dolus causam dans*), under which the party consented but would not have done so if he or she had known the truth. Although fraud leads the person into error, fraud and error should not be confused: in error, the person makes a false judgement about a particular object, thus being the author of the error and the one responsible for the inequivalence between the idea and the reality; in fraud, a third party intervenes to contrive a falsehood, through deception, in order to lead the *pars decepta* into a false perception of an object that seems true.

One may wonder about the legislator's long delay in acknowledging the invalidating effect of fraud, in the light of the exemplary sensitivity of canonical legislation towards the freedom and the truth of the contracting parties' internal consent. Three large issues weighed on canonical tradition. In the first place, the fact that, according to the general theory on juridical contracts, fraud does not in itself cause an *ipso facto* nullity of

the act. This is so because, being a defect of knowledge, and as irregular as its influence may be, the will may still be able to effect the conjugal bond which, by reason of its indissolubility, cannot remain in a state of possible nullity, as it would be if the law were to accept a rescinding action for consent given under fraud. In the second place, since the object of fraud had to do with a certain personal quality, this error was considered to be accidental, even if *causam dans*, and thus irrelevant (cf. c. 1097). In the third place, in the face of many deceptions, exaggerations, and malicious tricks, which often occur in the prenuptial time, canonical tradition was understandably reluctant to expose the security and indissolubility of the conjugal bond to the party's subjective impression of having been deceived, which often was rather the result from an unhappy matrimonial life.

Two different types of circumstances have spurred on the new legislative consideration of fraud. First, the impact produced on doctrine and jurisprudence by some blatant cases of fraud of evident and serious inequity, not only towards the party affected by the decision, but also towards the dignity of the matrimonial institution. Because of strict equity, those cases had to be decided at that time on inadequate grounds. Above all, however, a more personalistic view of marriage facilitated a more direct recognition that the choice of a spouse is a substantial part of the process of forming consent, which then produced a better and more profound understanding of the mechanisms of deceit that can directly ruin the freedom of consent. The fundamental reason behind c. 1098 is precisely the fact that a certain type of error, if intentionally sought, causes the ruin of free consent.

That is so because consent, as an act of the will, is an act proper to the author himself or herself, and the freedom of that act, insofar as it is an act under the will's dominion, is the specific subject matter of *vis et metus* of c. 1103 and not of error under fraud, which is part of the regulation of the intellect's contribution to the freedom of consent (*see* commentary on c. 1096, I for the study of the general principles). By means of the will enlightened by the intellect, the contracting party involves himself or herself so personally in the act of consenting, that the person consenting is the owner of the act, for consent is an act that has been originated in and by the person, who is then its author and master, as well as the one responsible for it. When we speak of the freedom of the act of consent, we mean that between the contracting person's authorship, ownership, and responsibility, and the act of consenting there is a cause and effect relationship. For this reason, then, fraud is an attempt against the freedom of consent insofar as a third party intervenes in the process of determining the choice of spouse by fraudulently manipulating the author of that act.

In order to predetermine the contracting party's choice of a spouse, a third party (*the pars decipiens*) misleads, by means of deception, the cognitive perception of the person contracting and thus manipulates that

person's elective process. Then we have the situation of deceit replacing in the contracting party, who is the author and the master of his or her free matrimonial consent, the specific choice of a spouse as his or her proper choice. Such vile and inadmissible manipulation of a person's will is a direct attempt against the very nature of the elective process which, *natura sua*, belongs exclusively to the contracting party's sovereign power. Since the spouse is the object of marital consent in itself (cf. c. 1057), the falsification of the qualities by which someone is chosen as spouse amounts to a third party's intervention to manipulate the object of the choice; it also amounts to depriving the contracting person from the authorship of the act of choosing the object of his or her own consent and, as a consequence, the act of contracting is deprived of the sufficient will.

Thus, it is not deception in itself that causes *ipso iure* marriage nullity. For this reason, deceit does not always invalidate consent. Neither is the gravity of the deceitful quality that makes marriage invalid. In the end, it is the substitution by a third party over the real dominion and authorship of the contracting party's personal process of knowing and wanting in the choice of the spouse—that is, the voluntariness of the act of contracting was formed by another and not the person himself or herself—, that lays the sufficient foundation, according to the demands of natural law, that error about a particular quality through fraud can invalidate matrimonial consent. Since many deceitful representations of "qualities" can occur during the couple's courtship, it is important to repeat that not every deception about a quality is a cause of marriage nullity; the nullity is produced by that type of error of quality which, by means of the fraudulent intervention of a third party, causes the choice of spouse to be neither free nor under the ownership of the contracting person and which, by predetermining the object of consent, it causes a deficient willfulness of the same consent. It is the objective of c. 1098 to draw the profile of this type of error.

It should be noted that the reason for the invalidating effect of the ground of nullity foreseen by c. 1098 is the causal link existing between the fraudulent act of the *pars decipiens* and the defective free consent of the *pars decepta*. This cause and effect relation is the key for the correct interpretation of the canon. It should not be thought, therefore, that the legislator's intent is that of granting an invalidating effect to a simple error concerning, firstly, a very grave quality that *suapte natura* seriously affects conjugal life, secondly, that the error should be deceitfully induced by a third party. If that were the interpretation of c. 1098, the nullity would be produced, first, by the gravity of the quality and, second, by the influence exercised by the *decipiens*, but then it would not be possible to explain why an error of a grave quality invalidates consent when it is induced by a third party and it does not invalidate when it is induced by the other contracting party. Furthermore, such interpretation would do away with the precise outline of both the error by fraud of c. 1098 and the error of a quality directly and principally intended of c. 1097, and it would

lead to the unfounded attempt, contrary to the general principle of c. 1097 § 2, of granting an invalidating force to the simple error of a grave quality; it would further lead to distorting the scope of error by fraud and the error of a quality directly and principally intended.

2. *The intervention of the pars decipiens or active subject of fraud*

a) *The intentionality of fraud*

The active subject of fraud can be the other spouse or a third party. The reason why the role of *pars decipiens* is not limited to the other contracting party and why any third party can be the author of the fraud is that the crucial effect caused by this error is the falsification of the object of consent of the *pars decepta*, by means of fraudulent manipulation, which can be induced by anybody and not just by the other spouse.

The canon requires that the fraudulent action has to be carried out by the *pars decipiens* with the aim of obtaining consent (*"ad obtinendum consensum"*). This requirement is part of the general notion of fraud, which consists of any stratagem, deception, mendacity, or machination directed to provoke error. Therefore, the deliberate intent to achieve the end of the fraudulent action is the real core of the act of the *pars decipiens*. Because without this *animus decipiendi*, there would be no cause and effect relationship between the action of the active subject and the mistaken conviction of the passive subject, but only a mere causality between a falsely perceived quality and the consequent error, which would then be only a simple error of the passive subject.

The intent to deceive, in that causal link mentioned above, is also the fundamental reason why the error by fraud is a ground of nullity, for without the *animus decipiendi* or fraudulent intent to achieve an extraneous and false contribution to the cognitive consent, there could be no manipulative intervention by a third party, no injury to the contracting person's ownership of the elective conjugal process, and no specific cause to provoke the deficient freedom of the act of contracting. A contracting party may have suffered from an error deriving from certain actions performed by others without *animus decipiendi*, but then the error would be caused by the party's own act which, unfortunate or naive as it may have been, would be a self-induced error after all. Even when the process of choosing a spouse may have been tarnished by error, the contracting party's ownership of the elective process would have remained untouched, that is to say, not injured, interposed, or manipulated by a third party. A person unaware of the deceiving effect of his or her influence over the contracting party may have induced that party into error but, not having being aware of it, the deceiving person has not deceived fraudulently, which makes the resulting error to be one that is self-imposed and, therefore, a simple error. In summary, with the expression *ad obtinendum consensum*, the

legislator requires an objectively fraudulent act about a quality and a cause and effect relationship between the deceiving action and the giving of consent.

b) *Fraudulent error, indirect fraud, force and fear*

The text and the spirit of the canon clearly exclude the so-called indirect fraud which consists of the act of a third party who, totally lacking any intent to deceive for the purpose of obtaining consent, is nevertheless understood by the person contracting in such a way that he or she is self-induced to err on the quality that motivated his or her consent. It is not legitimate to transfer the invalidating effect ascribed to indirect fear to the error of quality derived from fraud, for the two are not exactly comparable. To begin with, the ground of nullity of *vis et metus* is intended to protect the act of contracting from any physical or moral coercion. In this regard it must be noted that fear is not in itself an anomaly of the intellect but a subjective state of confusion which may directly affect the will so that, when a person is perturbed by the threats of an external human agent, an injury is inflicted on that person's freedom. From this it follows that it is irrelevant to ask whether or not the agent, who in any case wished to inflict fear, may have directly sought to obtain consent.

In contrast, in the formulation of error fraudulently induced, the legislator seeks to protect the process of conjugal choice (*see* commentary on c. 1096, I), insofar as this process is formed by the sequence of the contracting party's own intellect and will in the decision process (never alien and fraudulent) which leads to the needed object of consent. For this reason, then, if the contracting party falsely interprets another person's deeds and links this error to his or her own decision to contract, with no manipulating intervention of another person directly intending to provoke consent, then the error is self-induced. While a real lack of freedom is a direct injury to the will (hence the relevancy of indirect fear), those errors induced by the person's own actions (except for the error on the person, on redundant quality, and on quality directly intended) are errors of the intellect only, which do not necessarily imply lack of willfulness, hence the irrelevancy of indirect fraud and the inappropriateness of comparing it to indirect fear.

c) *Types of fraud*

The *animus decipiendi* requirement allows the legislator to recognise a wide variety of fraudulent error of quality, as long as the intention to manipulate the process of forming the will of the contracting party is demonstrated to exist under any of those types of fraud.

The canon, therefore, includes the so-called positive fraud, or fraud caused by the production of false indicators, as well as the negative fraud caused by concealment, evasion, silence, or omission of those facts, information, or circumstances that could have shown the truth to the *pars decepta*. However, negative fraud does not require that the *pars decipiens*

should be required, by reasons of office or status, to inform the person of the truth. At the same time, a case of fraud does occur, even aggravated, when the party in good faith behaved with a great deal of trust, credulity, and even naiveté, as it frequently happens especially in a love relationship, and the deceiver used those dispositions as a basis for deceit. In fact, the deceiver may have also used those traits of character, which make a person prone to be deceived to deliberately keep the person in error: even if this error may have originated in the person's naiveté or credulity, the *pars decipiens* knowingly uses this to keep alive the deceit, or even to fraudulently increase it in order to obtain consent or to avoid its revocation. From the perspective of the *pars decipiens*, the key issues to be determined are the objectivity of the fraud, regardless of its modality, and the causal link between the fraudulent act and the giving of consent. The assessment of both the objectivity and the causality of the fraudulent act are to be completed according to the nature of the quality feigned, as we shall see.

3. *The passive subject of fraud or* deceptus dolo

The active subject of fraud can be, as explained, any third party besides the other spouse; only one of the spouses, however, can be passive subject.

In the first place, the passive subject must have, necessarily, suffered an error on a quality of the other contracting party, because the party who does not err, in spite of all the schemes and machinations concocted to deceive him or her, but knows the real truth cannot, as it is obvious, invoke fraud as a unilateral act of the *pars decipiens*. The contracting person has not been, at the time of consent, the victim of the error intended by the fraud. The error formulated by c. 1098 is, therefore, an error derived from fraud. By this we mean to underline that the mere existence of an *actio dolosa*, which has not provoked an error, does not constitute a cause of nullity. This is so because the purpose of the norm is not to punish fraud and the deceiving person but to protect the contracting party's ownership of the decision-making process from an error due to fraudulent manipulation.

4. *The requirements of the quality*

In the first place, the quality that is the object of the deception must refer to the other spouse. This means that the quality cannot be disconnected with and be foreign to the choice of a spouse but must be intrinsic to the selection of a person as spouse. The quality can be physical (sterility, for example) or moral in the wide sense of the word (psychic, juridical, social, professional, financial, religious ...). For the effect to be

invalidating, however, the legislator has restricted this wide spectrum of qualities that can be the object of fraudulent error to those that, by their very nature, can seriously disrupt the partnership of conjugal life ("*quae suapte natura consortium vitae coniugalis graviter perturbare potest*").

The purpose of that norm is to deprive of any relevancy those other "qualities" that are trivial, superficial, arbitrary, and not susceptible of being objectively linked to those that, by their nature, can seriously disrupt the *consortium coniugalis vitae.* This conjugal partnership has, *suapte natura,* two dimensions: one such dimension consists of the life-partnership that is objectively and institutionally matrimonial (the one and indissoluble bond aimed at the good of the spouses and to the procreation and education of offspring); the other dimension is the subjective life-partnership of the spouses (the manner by which the subjective ends, in particular harmony with the objective and institutional ends, form a very personal conjugal life). The spouses choose each other under the influence of those qualities which they deem important in order to attain that twofold dimension of the partnership or common partnership of conjugal life. Often a contracting party implicitly assumes that the qualities needed more for conjugal life, from the perspective of the objective ends, do exist in the chosen spouse precisely because they are so fundamental (e.g., the capacity to generate). At the same time, the contracting party may be more strongly motivated, or at least in a more definite, explicit, and experienced fashion, by other qualities, which the contracting party thinks exist, and which refer to the type of a spouse that would be more suitable to attain the subjective ends, or the particular partnership of conjugal life expected to live within the bosom of the institutional or objective structure of marriage (e.g., industriousness, solid financial position if the person suffered privations and misery, sobriety against immoderate drinking, certain academic and professional degrees, and so forth). The partnership of conjugal life, therefore, can be seriously disrupted, *suapte natura,* by those two types of qualities.

a) When the quality on which the person errs, because of fraud, refers directly to the demands of the institutional essence, properties or ends of marriage, then, the relationship of the qualities to the serious disturbance of the partnership of conjugal life is proven *ipso facto,* the fraud produced on such quality (e.g., positive or negative fraud about a habitually licentious behaviour concerning fidelity) carries with it a strong presumption in favour of the intention to obtain consent.

b) When the error from fraud refers to a quality related to the subjective partnership of conjugal life, the quality should be objectively able (*suapte natura*) to seriously disturb conjugal common life as well as be the motivating cause of the choice of the other person as a spouse. An error about a quality of the other person cannot affect the object of consent if it had no influence in the choice of the spouse, because of not being appreciated or not even considered in the selective process, even if

induced by fraud (incidental fraud). This is so even though the quality in itself may be important to another person (e.g., religious practice). For this reason, in the proof of this error, the techniques of the error *causam dans*, in its negative aspect, should be applied to this type of motivating qualities; that is to say, it should be shown that the motivating power of the quality thought to exist was so strong that, had the contracting party known the truth in time, he or she would not have married. This motivating and persuading character of the quality needs to be demonstrated by showing that it remains present throughout the contracting party's process of choosing the spouse.

5. *The retroactive effect of c. 1098*

It would seem that c. 1098 is applicable to those marriages contracted before 27, November 1983, when the new code came into force, because this norm is of natural law, even though the legislator has positively determined its specific formulation, as is necessarily the case with all the positive formulations of the norms of natural law, including the *ius connubii*.

The retroactivity of this norm does not mean, however, that past marriages contracted with the characteristics described in the canon are null, for the principle *"leges respiciunt futura, non praeterita"* (cf. c. 9) is to be applied. We should, rather, understand that the present formulation of c. 1098 is more in tune with the legislative reform of the present code, as it has also happened with c. 1095 (concerning the impossibility to assume, because of a psychic cause, the essential obligations), c. 1097 § 2 (on error about a quality directly and principally intended), c. 1099 (on determining error about the sacramental dignity), c. 1101 § 2 (on the exclusion of the good of the spouses), and c. 1103 (on indirect fear). Expressed in the form of legislative norms, all these canons provide a better reorganisation of the former and more usual jurisprudential decisions under which those situations of fact were judged as nullity causes, even though this had to be done at the time by less than adequate means that were also narrower or more constrained than the criteria of the present discipline.

1099 Error circa matrimonii unitatem vel indissolubilitatem aut sacramentalem dignitatem, dummodo non determinet vel voluntatem, non vitiat consensum matrimonialem.

Provided it does not determine the will, error concerning the unity or the indissolubility or the sacramental dignity of marriage does not vitiate matrimonial consent.

SOURCES: c. 1084; SRR Decisio coram Felici, 13 iul. 1954; SRR Decisio coram Felici, 17 dec. 1957; SRR Decisio coram Filipiak, 23 mar. 1956; SRR Decisio coram Sabattani, 12 nov. 1964; SRR Decisio coram Ewers, 24 feb. 1968; SRR Decisio coram Ewers, 16 maii 1968; SRR Decisio coram Anné, 11 mar. 1975

CROSS REFERENCES: cc. 126, 1055, 1056, 1057, 1095, 1096, 1101, 1102

COMMENTARY

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1. *The factual framework*

For the general hermeneutical principles common to cc. 1096–1100, *see* commentary on c. 1096, I. This canon regulates the effects of the so-called error of law concerning unity and indissolubility (the properties of the marital bond) as well as on the sacramental dignity of marriage. The canon covers all those situations of fact leading the contracting party to marry with the mistaken conviction that may have originated in the great variety of factors and circumstances that form a person's idea of marriage: the education and formation the person has received, or their absence and malformation, the person's social cultural and ideological milieu, the habits, frame of mind, customs, options available, as well as the beliefs and convictions formed by the person's vital life experience and circumstances.

The factual framework of this error is not uniform and not confined to one prototype. It is rather ample, heterogeneous, and difficult to categorise juridically. The canon acknowledges that the error of the intellect about the properties and the sacramentality of marriage invalidates marriage only when it determines the will, otherwise that error is irrelevant. In summary, the legislator acknowledges that within such a diverse factual framework there can exist *an invalidating error that is an autonomous ground of nullity*; that is to say, a form of consent that is

invalid in its object (i.e., a false marriage that the contracting party actually wants) because the only kind of matrimonial bond that the person's practical intellect can perceive, assess, and offer to the will in the act of contracting is false.

2. *The complementary role of c. 1099 and its difference with the substantial error of c. 1096*

It is important not to forget that the discipline contained in this canon is based on the notion that *the validity of consent may depend on the intellect's appropriate contribution* to its formation. In this sense it can be said that, in relation with those principles that explain the relationship between the intellect and will in the formation of consent, c. 1099 completes c. 1096. In c. 1096 the object of ignorance or error is the very substance of the matrimonial institution, which is also the minimal cognitive presupposition needed for the will to have an object to adhere to, or object to want. In c. 1099 the properties and the sacramental dignity are the object of an error which does not prevent the person from knowing that marriage is a permanent partnership between a man and a woman ordered to the procreation of offspring which, being the necessary and sufficient cognitive presupposition of consent, makes it possible for consent to exist.

This is the reason why a person who ignores or errs in the substance of marriage itself (c. 1096) cannot even contribute a minimum matrimonial object to his or her will. Consequently, *all cases* of ignorance or error about the substance of marriage invalidate consent by reason of the fact that matrimonial consent is lacking in itself. However, the person who marries "*with*" an error about the properties or about sacramentality contributes a matrimonial object for the will to want or adhere to so that, unless otherwise demonstrated, the person is able to consent validly. This is what canonical doctrine means when it customarily states that the person who marries "with" an error about the properties or the sacramentality *wants to marry. Hence, c. 1099 cannot establish the principle of absolute invalidity, as c. 1096 does, for all cases in which the person labours under an error about the properties or about the sacramentality of marriage.* Besides pointing out this difference between substantial error and accidental error of law, we must add that error, insofar as it implies an imperfection of the intellect, does not always turn into an object directly desired by the will (i.e., the specific marital bond wanted) even when the error refers to the properties or to the sacramentality. Consequently, *an error of the speculative intellect need not vitiate the act of the will, and thus carry an invalidating effect, as long as the error does not determine the specific marital bond sought by the will's practical act of contracting.*

Having distinguished between the substantial error of law and the irrelevant (or simple) error about the properties and the sacramentality of marriage, the legislator does not forget that within the framework of the mutual relationship between intellect and will, the latter is determined by the cognitive contribution of the practical intellect to the will's specific choice and implementation. In this sense, an error of practical judgement about the properties, or about the sacramentality, leads consent to establish "a specific false marriage" only when the error succeeds in forming the object of choice as the specific good to be chosen by the will. For this reason, the legislator regulates in c. 1099 the effects of the error about the properties and the sacramentality by logically distinguishing between an invalidating effect and an irrelevant effect. There are to be detected in each particular and specific case: the invalidating effect occurs when the error of the practical intellect determines the will to want the false object; the irrelevant effect takes place when the error remains a "simple" anomaly of the contracting party's speculative intellect.

3. *The simple error of the speculative intellect*

The canon under consideration sustains the canonical tradition holding that those laboring under this error on those characteristics of marriage does not necessarily, or automatically, invalidate the consent of the contracting party. The reason is clear: although error is an anomaly of the intellect, the efficient cause of marriage is not the act of the intellect but the act of wanting, or act of the will. Besides, the manner by which the properties and the sacramentality of the marital bond are held by the speculative intellect (as true or false) is different from the way they are sought by the will (as a concrete good desired for my own particular marital union). Consequently, as long as the error is only an intellectual falsehood that has not formed the core of the concrete object desired by the will, the latter remains free to determine itself towards the good of a specific true marriage because it has not been infected by the theoretical falsehood of the intellect concerning the matrimonial institution.

Human beings are not so much the ideas they think as the voluntary acts they perform (*see* commentary on cc. 1096 and 1097). The human person is less intimately and fully involved in the theories residing in his or her intellect than in what the person specifically wants by his or her voluntary acts. We make decisions, all the time, about objects which, being indeed wanted, are only partially present in the intellect and even imperfectly understood. One may say, for instance, "I want to grow old with you" without really knowing what type of old age to expect or thinking, perhaps, that medical sciences offer a sufficient guarantee of a "healthy" old age; more simply, persons in love may, totally convinced, tell each other, "I love you because you are the best in the whole world" which, as it

is obvious, is a beautiful error. Or we may even fervently desire certain things referring to our own real life that are contrary to the tenets of our philosophy of life or ideology. A person may truthfully affirm that "I want our union to never end," "I want it to be forever," "I want a complete happiness between us," "I want to have our children," and yet that same person may sustain that divorce and abortion are personal rights in a progressive society. In itself, then, an error on the properties or on the sacramentality, insofar as it is a false judgement of the speculative intellect, does not prevent the person from wanting that the specific marital life that the person establishes for him or herself may last forever, be mutually faithful, and not closed to God's intervention.

4. *Changes in the present text compared to c. 1084* CIC/*1917: non-existence of the legal presumptions in favour of simple error and of invalidating error in the decisions made in individual cases*

Although it can be said that the supporting criteria of the present discipline about error of law concerning the qualities of the juridical act are not different from those of *CIC*/1917, the literal meaning of the present c. 1099 contains certain significant changes from the former c. 1084 of *CIC*/1917. Qualifying error as simple (*simplex*) has been suppressed. The link between error and motivation is avoided by not mentioning the error *causam dans*. Finally error determining the will, as a cause of nullity, has been explicitly introduced in the text instead of leaving it to an interpretation, *sensu contrario*, of the simple error.

The literal meaning of c. 1099 does not favour the tendency to interpret the norm as a presumption *iuris tantum* in favour of simple error and against determining error, an interpretation aided by the literal meaning of c. 1084 of *CIC*/1917 in which only simple error was explicitly mentioned as irrelevant. To say it differently, now the canonist must assess, above all, the particular circumstances of each case without any preconceived inclination to interpret the facts with a statistical or generic prejudice in favour of simple error. Whether the case in point is affected by simple error or by determining error is to be determined by the real facts of the particular process that formed consent. To continue to examine each case from that "predisposition" involves the risk, on the one hand, of assuming that determining error is the exception and, on the other hand, of creating a presumption favoring irrelevant simple error thus requiring an unjust overburden of proof in each case to overturn the statistical, generic, and theoretical impetus that favours simple error. By the same token, it would be unreasonable to establish the contrary presumption in favour of determining error, and to transfer the burden of proof to simple error by interpreting the canon in the sense that the legislator now understands that a speculative error on the properties or on the sacramentality is a determining error, unless a simple error is proven to exist.

The canonist must distinguish between the theoretical exposition for pedagogical purposes, in which one can advocate that simple error is statistically more frequent, and the judgement in a real case in which, by reason of the case itself, the ground of nullity should not be applied simply on statistical considerations. The objective of the *favor iuris* is to protect the external validity of a juridical act, specifically of the celebration of marriage in the Church, by means of a presumption *iuris tantum*, but the actual validity or invalidity of the marriage depends on the real existence or non-existence of the ground of nullity in the particular situation of fact, which is what needs to be judged.

5. *Distinction between motivating error and error determining the will*

The present text of c. 1099 avoids to mention, as already pointed out, the *error causam dans contractu* concerning the properties or the sacramental dignity, not even to ratify the irrelevancy of this motivating source as did c. 1084 of *CIC*/1917. This does not at all mean that the motivating error is identified with the determining error. Rather, by means of that silence, the legislator clarifies, quite precisely, that in the present c. 1099 the cause of the invalidating effect of the error determining the will is neither related to nor contrary to the mechanics in the causes motivating the will. What happens is that motivation and self-determination are diverse mechanisms of the process of forming consent so that their respective effects cannot be confused. The error that determines the will can also be an error that motivates the will, but the latter does not become, just by reason of motivating the will, an error that determines the will and thus an invalidating error.

The will determines itself from within so that, as long as it enjoys psychological freedom, no motivation can determine the will from without, not even one that moves the person to want to marry. Although a motivation is the basis for its corresponding action in this sense it is said that it "moves" the will. This motivating influence is never to be confused with the will's self-determination, which consists of the power to generate, in and by itself, the subject's action as the author of his or her own action. The subject's will to act is a self-movement of the subject's own will. This self-movement is, in itself, different from any influence, including that coming from the person's intellectual or sensorial knowledge of objects by means of his or her own intellect or senses. We can always not act on our inclinations so that, as it happens in many cases, such a decision is difficult but not impossible. The will may, indeed, decide to turn a motivating quality into the object desired by the will thus assuming that object into the object of the will, but *this transformation is done by the will, in and by itself* since a mere inclination is not able to produce this transformation. Without the self-determination of the will, a motivating influence is

only a "temptation" but not an "intention." Confronted by inclinations, the will can decide to want them or to reject them. For this reason the determination of the subject's personal will must be, by definition, a self-determination so that no determination *ab extrinseco* can be, at the same time, a voluntary one. Rather, a "determination" from without is simply an imposition which, in the canonical system, is considered a vice of consent by reason of lack of freedom (cf. cc. 1103 and 1095 on physical or moral coercion provoked by a threatening third party and on the lack of internal freedom by reason of a psychic cause).

When the lack of indissolubility, unity, or sacramentality are, because of error, the characteristics which lead the person to desire to contract or influence the person to contract or, in other words, when those characteristics "motivate" the person in that direction, the deciding process can present diverse features of very different effects and systematic categories. In the first place, the person can voluntarily act against his or her own motives. The person, in other words, may accept the proposition to marry because, among other motives, he or she believes that the marriage can be dissolved, or that no exclusive fidelity is required, or that he or she does not believe it to be sacramental so that the error facilitates, or "motivates," the person to give consent to the marriage. In spite of all that, the contracting party may also desire that this man or woman, whom one marries, should be faithful for life, while correspondingly being willing oneself to be equally faithful and without rejecting God's help through the trials of married life. This would be, in actual fact, the conjugal union that one specifically chooses for oneself at the moment of establishing it and that one wants for his or her own life. That error about the properties or the sacramentality would, therefore, be irrelevant because, even though it had been present as a motive for consent, it did not constitute the concrete union chosen by the contracting party and established for oneself (which is the real object of a specific marital consent).

A different situation would be that of the person who, besides being motivated by the error about the properties or the sacramentality, desires that the specific conjugal union to be contracted with a particular man or woman should be established and should evolve as he or she conceives it. This contracting party knows that others, including the Catholic Church, think of marriage as indissoluble, one, and sacramental but believes they are wrong; or the party simply thinks that those characteristics of marriage are ideological, cultural, or religious ideas with which the contracting party disagrees. In such a situation, *the person's specific will in contracting has not only been motivated to wed by reason of the error, but it has also chosen the erroneous concept and preferred it as the explicitly desired form of his or her specific conjugal union.*

Notice that, in the situation mentioned above, the person's subjective certitude about being right shows the revealing fact that the dynamics of the will's self-determination is the same in the person who errs and in the

one who, in marrying, chooses a true bond (one, indissoluble, and sacramental) because it is the type of bond that moves the persons' will to marry. In other words, when we say that the "normal" contracting party chooses, from among the other known options, the one, indissoluble, and sacramental bond because the party correctly believes it to be the true bond, we are not saying that the truth of the motivation determines the party's will, for the truth is a property that can be predicated of the object, insofar as this object is known. It is not to be confused with the will itself, by which the party consents, when the "normal" contracting party chooses the true bond. He or she does so by an act of the will, which is the act of choosing the property desired for his or her conjugal bond, while the truth only inclines or motivates the person, for neither the truth nor the intellect, not even the practical intellect, to make decisions. The will chooses and adheres itself to the object chosen, and for this reason we do not say that the "normal" contracting party marries with the intellect, insofar as it possesses the truth and because it possesses it, nor do we say that the party marries with the motivation, insofar as the motivation moves the person and exercises an influence over the person. We say, rather, that the person marries with the will, which takes what is true as well as what exercises the influence, *as the object that is wanted because, in the last analysis, the will just wants it.* Likewise, the person who unknowingly labours under error acts with the certitude of one believing something as truthful, but the party's error, as error, is not what determines the choice of the false bond from among other types; it is, rather, the will of the party which generates, in itself and by itself, the movement of choosing and of being implicated in the object chosen. The influence of the truth or of the error (both held with certitude by the person who is right and the one who is wrong) is not the essence of the will's self-determination nor, therefore, of matrimonial consent.

In our opinion, it is incorrect to use arguments and ideas that belong to the ambit of the will's motivation in order to interpret the nature of determining error. With this method of interpretation, the reason for the determining character of error, and of its consequent invalidating effect, is sought in the strong motivating force of the erroneous characteristic desired by the party. An approach that tends to blur the differentiating limits between irrelevant error and determining error, and between determining error as an autonomous ground of nullity and error as cause of simulation (cf. c. 1101 § 2). By lacking precision in applying the pertinent concepts, the canonist risks falling first into ambiguous meanings and then into arbitrary use of juridical categories. That type of imprecise argumentation assigns the same meaning to such concepts as "to motivate," "to move," and "to determine the will" or, at the most, understands them as chain links necessarily and mechanically joined. In order to better understand this, it seems fitting to define the exact meaning of the dynamics of the process of "determining" the will.

6. *Invalidating error that determines the will*

We must begin with the premise that "to understand" is not the same as "to want." The will moves the intellect to effect its proper operations, namely to know the truth, to deliberate about it, and to refer it back to the will as the object of choice. This being so, even with the intellect's "practical" function of perceiving something as a suitable good, it belongs to the will to adhere to the truth presented by the practical judgement as a good for me, here and now, to implicate the subject in the act, and to implement the act. What the intellect knows, it knows it as true; what the will wants, it wants it as good.

That difference between the two forms by which the same object (the marital bond) is known by the intellect and is wanted by the will has two consequences. The first is that the act of the will is not the automatic outcome of the intellectual discourse about the properties or the sacramentality of the matrimonial institution. It is, rather, a new and original act about the same object (the matrimonial bond), which is perceived and proposed by the intellect to the will as a desirable object that ought to be chosen as the particular content that the will wants for its own specific act. The second consequence is that, although the will's decision is a new and original act proper to the will (self-determination), it depends on the practical judgement of the intellect. For the will to choose the specific matrimonial bond to be established and implemented in real life, the intellect has to offer that specific matrimonial bond to the will as a suitable good. The choice of the proposed conjugal bond (with or without its properties and sacramental dignity) turns the suitable good offered by the practical judgement into the specific object wanted here and now. This, in turn, demands, on the part of the subject, a new and original act of the will.

It should be noted that for the will to determine itself, the practical intellect should, by means of a practical judgement, first propose to the will the act to be accomplished so that, without that proposal the will cannot have an object of choice. If the will, nevertheless, were to act without that prior proposal, it would produce an arbitrary and meaningless act amounting to a psychic anomaly and a lack of rational wilfulness. Now we can see that an error of the intellect can, indeed, determine the will in a way that invalidates the matrimonial object of consent. When the judgement of the practical intellect proposes only one type of marital bond for the marriage being established *because the person has not deliberated on it or knows no other type, then the will determines itself to appropriate that particular type of conjugal union which the practical intellect has proposed as the one to be implemented throughout the person's life.* A person, for example, might say that "the only thing I know to be good and suitable to me is that the conjugal union is to be permanent (or to be faithful or monogamous) for as long as it causes me happiness." In that predicament, the person may choose not to marry because, even if knowing of

no other types of conjugal union, he or she may still not want that type that has been offered by the intellect. However, if the person decides to marry, *then the only judgement offered by the practical intellect concerning the conjugal bond is, by necessity, the only type of specific bond that the will can choose and want.* Insofar as this error has determined the will, consent is invalid because, even though this act of the will pretends to establish a "union" of sorts, one without indissolubility, unity and sacramentality is not an objectively true marriage regardless of the person's certainty.

7. *The autonomy of determining error in relation with the error* "causa simulandi"

An error, as such, can only determine the will when it constitutes, as in the case of a person who knows no other type of bond, the only proposal that practical reason, perceives, ponders, and suggests to the will as the only suitable contents of the act to be carried out. In that situation, *the person is necessarily self-determined towards the only type of suitable conjugal bond that the intellect proposes and the will wants with the certainty of being the only true bond, even if it is a false bond.*

That is not the case with simulation caused by error. The subject of simulation is able to make, and does make, a positive act of choosing (and of excluding) the object proposed by the practical intellect because, not being a single but a plural object, it does not determine the will toward one possible choice only. For this reason the choice of the will, insofar as it selects from among several options, is not determined by the error even when choosing the wrong option. The choice of the will is, rather, a selective self-determination. For the will prefers this type of bond over the other types known by "practical" judgement. In simulation, the precise cause of nullity is the specific act of selecting a bond that is dissoluble, not exclusive, or not sacramental; the error may have influenced and motivated the will but it has not necessarily determined the choice because the error existed in concomitance with the knowledge of the truth. For this reason, then, the cause of the invalidating effect is not the error, but the will's act of exclusion; that is to say, the errors about the diverse aspects of marital unity or indissolubility, or about other essential elements of marriage, which the practical judgement can offer in its specific display of options, can also be presented to the person as an inducement to marriage. For example, a man may say that "one of the reasons for marrying is that marriage binds me only to a public state of monogamy so that, while respecting those juridical and social forms of marriage, I am allowed to have relations with other women privately and discreetly"; or another may say that "marriage persists for as long as the spouses are in love with each other, and it ceases to exist when love dies, and for this reason I choose to

marry because now I am in love and because I can dissolve it when love disappears." In those cases, the error can be the motive for positively wanting for oneself, with an act of the will that excludes or simulates, a bond deprived of one of the properties. In those cases, then, in which the contracting party chooses the erroneous content of the motivating inducement, the error has acted as the cause of the positive act that excludes unity in the specific marriage contracted. The selective or preferential choice of a false bond, which implies the exclusion of the true bond, places the *fattispecie* within the realm of willful exclusion of the properties or of sacramentality (the simulating aspect) so that the error is the cause of the wilful exclusion (the *causa simulandi*). The positive act of exclusion is formed by this error because, by choosing a bond that is dissoluble, or not exclusively faithful, or non-sacramental, the will also excludes indissolubility, or unity, or sacramentality. That selective and excluding preference is the positive act of the will of c. 1101 § 2 in which the error does not determine the will but exercises an influence as the motive for the selective choice of the false bond. While the error does explain that choice it does not determine it.

In the error *causa simulandi* the contracting party is able to select one option from several and, should the party choose the erroneous option concerning the properties, the *caput nullitatis* is the positive act of the will freely choosing the error. In the case of determining error, the act of selecting is lacking because the will is inevitably determined *ad falsum* by the practical judgement of the intellect. From this it follows that determining error is an autonomous *caput nullitatis* because the dysfunction of the practical intellect, from which the invalidating effect derives, is in itself sufficiently serious enough to deprive consent from its true matrimonial object. In determining error, therefore, the contracting person does not select and does not exclude any option because the party is not aware of any possible choice because none exists. Without choice there is no exclusion either. So the person who errs pre-determined by the error does not want to simulate and cannot be aware of having simulated: without the will to simulate one cannot do so, as one cannot exclude without wanting to. The party, rather, is certain of wanting the only conjugal bond that he or she knows and thinks to be the true one that is suitable to him or her.

It follows, then, that in regards to determining error it makes little sense to require the positive act of the will that is characteristic of simulation caused by error. Nor is it correct to try to explain the invalidating effect of determining error by presuming an implicit act of exclusion by the person who errs. This would mean interpreting the error as a cause of the simulation as in c. 1101 § 2, even though the text of c. 1099 *expresis verbis* declares that determining error is an autonomous cause of nullity. The persons who errs with a pre-determined will is not conscious of any contradiction between his or her internal intention and the corresponding

external manifestation of consent. The contradiction exists only objectively between the bond that the person intends to establish and the one that the law judges to be true and valid.

When a person affected by a determining error discovers the truth about the properties or about the sacramentality of the bond shortly before marrying (e.g., during the prenuptial examination or even during a preparatory course of instruction), it should not be assumed that "the newly acquired knowledge of the truth" is like a beacon of light which, automatically switched on, dispels the error from the judgement of practical reason. Due to the vital and ingrained character of determining error, this type of belated information is often routinely filed in the person's speculative intellect in a depersonalised fashion without becoming a real option of practical judgement. If this is the case in actual fact, the person continues to labour under a determining error, but if it happens that the person reflects on the new information received about the true properties or about the sacramentality of marriage as another alternative which the practical intellect offers to the choice of the will, then the ratified choice of a dissoluble bond, or of a bond deprived of unity or of sacramentality, is technically considered a case of exclusion (c. 1101 § 2) with the error being the *causa simulandi*.

8. *Characteristics of the proof:* error pervicax

The error that determines the will is not a speculative, theoretical error; it is a falsehood exhibited, as a practical habit, through the person's attitudes and real life behaviour, that is to say, through the person's actual lifestyle. While the speculative intellect seeks to know the truth of an existing object (which in the present context is the abstract notion of the institution of marriage), the object of the practical intellect is a truth which, not yet existing in the person's vital reality, is *to be brought about by the person's own action* (namely the particular conjugal union that is desired, in actual practice, as devoid of indissolubility, unity, or sacramentality). This "practical truth" does not only exist in the mind; the truth, or in this case an error, is practiced in one's life. Between the theoretical truth grasped by the speculative intellect and the practical truth of the judgement of practical reason, there is no logical continuity but an illogical jump. The reason for this is that a "practical truth" refers to a particular and contingent act to be brought into reality, not by the intellect's proper act of knowing but only by the will, the person's faculty that can generate the action of self-realisation or self-fulfillment. Because of this, a determining error must be a practical error embodied in the person's living practice. The attentive observer of the antecedent, concomitant and, above all, subsequent evidence that characterises a union affected by determining error will not find, in the case examined, the type of facts and

the forms of behaviour that reveal an intent to live, even if unsuccessfully, an indissolubility faithful union that forms one's self-identity. The attentive observer will rather find, in the party in question, a set of attitudes of transitoriness, infidelity, and hardening to the grace of the union, as exhibited by the person's frequent and recurrent destructive behaviour ruled, day after day, by the fate of circumstances and by the person's self-indulgence, it forms a "continuous factual line" rooted in the time prior to the wedding that progressively worsens. Since the person labouring under determining error is immersed in the error and knows nothing but the error, the proof of determining error is to be found in the person's "biographical continuum."

Now we can understand the profound intuition of canonical jurisprudence showed by its configuration of obstinate (*pervicax*) error as the morally accurate proof of the determining effect that an error of the practical judgement can exercise over the will. Indeed, those manifestation of obstinacy, unequivocal certitude, and deeply rooted attitudes of a person's practical behaviour concerning conjugal and family habits of dissolubility, polygamy, promiscuity, infidelity, and denial of any supernatural transcendence are the symptoms of a will that wants that type of conjugal bond in a habitual, tenacious, firm, impervious, constant, and stubborn manner characteristic of a person who wants and does only what he or she understands. When those symptoms exist throughout a person's life history, one can be morally certain that the person has not suffered a simple speculative error about indissolubility, unity, or sacramentality but a determining error (or an error turned into *causa simulandi*).

9. *Determining error concerning the sacramental dignity of matrimony: the interrelation between cc. 1099 and 1101*

a) *The terms of the dilemma: is the lack of faith on the part of contracting parties juridically relevant?*

It is not rare to find baptised persons who, having departed from the faith, desire to contract, and in fact do contract, in the Church with no intention to heed the demands of personal conversion. In the face of those situations, one may ask if it is possible for baptised persons, who declare themselves to be non-believers, to contract a marriage that is a true sacrament. To put it differently, one may ask why faith is not required for the contracting party to validly receive the sacrament of marriage, mainly if we consider that should faith not be required, the non-believing party would receive it against his or her free will, or unconsciously and mechanically, something that the party rejects or ignores. Since c. 1055 § 2 precludes any separation between contract and sacrament, so that a person who does not contract a valid marriage does not receive the sacrament, should not the same principle apply to the person lacking the faith needed for a valid sacrament, who could not contract, then, a valid marriage?

Furthermore, if c. 1099 admits the possibility of error about sacramental dignity, which can invalidate marriage if it determines the will, we ought to accept *a fortiori* the invalidating possibility of a person who wants to exclude sacramentality, not by reason of an error but due to a conscious and free self-determination of the will.

Following those lines of argumentation, some authors tend to support the thesis that the lack of faith, on the part of baptised Catholics, would prevent the contracting parties from the required intention of doing what the Church intends to do when celebrating the sacrament of marriage. Those authors argue that in imparting a sacrament, the Church performs a sign of faith and of participation in Christ so that, a marriage "without faith" between two Catholics would be necessarily null, in some cases because of determining error and in other cases because of voluntary exclusion of sacramentality. Some important texts seem to support that thesis. Among other texts, SC 59 states that "They [the sacraments, including matrimony] not only presuppose faith, but by words and objects they also nourish, strengthen, and express it; that is why they are called 'sacraments of faith.'" In the first edition of the Roman Ritual it was said that, "Let pastors of souls foster and strengthen, above all, the faith of the spouses because the sacrament of marriage supposes and requires faith." Finally *FC* 68 explains that with those "engaged couples who show that they reject explicitly and formally what the Church intends to do when the marriage of baptised persons is celebrated, the pastor of souls cannot admit them to the celebration of marriage. In spite of his reluctance to do so, he has the duty to take note of the situation and to make it clear to those concerned that, in these circumstances, it is not the Church that is placing an obstacle in the way of the celebration that they are asking for, but themselves."

Nevertheless, the most important and most credible sector of canonical doctrine and jurisprudence understands that requiring faith for the validity of marriage may imply an error of principle concerning sacramentality, as understood by the Church and as stated in c. 1055 § 2. When we relate sacramentality to marriage and connect the two, we should not think of sacramentality as a substantial reality different from the conjugal pact, even if inseparably connected with it, as if the contracting party had to elicit a double act of the will towards *two objects*: marriage itself on the one hand, and sacramentality on the other hand. It is not that marriage is wanted by the act of consent and sacramentality by the act of faith, so that lacking the first, the second would be useless, and lacking the second, the first would be null: the error on the principle lays precisely in that notion of a dual, although inseparable, reality between contract and sacramentality. The sacrament consists of *the same and the only valid natural marriage* which, among the baptised, has been raised to the order of supernatural grace thus acquiring firmness. Therefore, when two baptised persons render true consent and thus establish a partnership of their

entire life ordered to the conjugal good and to the procreation and education of the children, they also establish the same and the one marriage which, inserted by its own nature in the plans of the Creator "in the beginning," has been raised by baptism to the order of grace and contains a specific (sacramental) configuration with Christ the Spouse. *In short, for* marriage to be a sacrament, baptised persons require nothing else but to want, with a right intention, the same and the one marriage which God has instituted in the creation.

In favour of the understanding of sacramentality explained in the previous paragraph, we can adduce some more specific and recent texts of the Magisterium on the matter. Thus, *FC* 68 explicitly states that, "The sacrament of Matrimony has this specific element that distinguishes it from all the other sacraments: it is the sacrament of something that was part of the very economy of creation; it is the very conjugal covenant instituted by the Creator 'in the beginning.' Therefore the decision of a man and a woman to marry in accordance with this divine plan, that is to say, the decision to commit by their irrevocable conjugal consent their whole lives in indissoluble love and unconditional fidelity, really involves, even if not in a fully conscious way, an attitude of profound obedience to the will of God, an attitude which cannot exist without God's grace. They have thus already begun what is in a true and proper sense a journey towards salvation, a journey which the celebration of the sacrament and the immediate preparation for it can complement and bring to completion, given *the uprightness of their intention.*"

In relation with the specific case of those baptised persons who ask to marry before the Church motivated only by social reasons, the same Ap. Exh. points out that, "these engaged couples, by virtue of their Baptism, are already really sharers in Christ's marriage Covenant with the Church, and that, by their right intention, they have accepted God's plan regarding marriage and therefore at least implicitly consent to what the Church intends to do when she celebrates marriage. Thus, the fact that motives of a social nature also enter into the request is not enough to justify refusal on the part of pastors."

Finally, concerning the existence or non-existence of faith, the same Ap. Exh. concludes by saying that, "As for wishing to lay down further criteria for admission to the ecclesial celebration of marriage, criteria that would concern the level of faith of those to be married, this would above all involve grave risks. In the first place, the risk of making unfounded and discriminatory judgments; secondly, the risk of causing doubts about the validity of marriages already celebrated, with grave harm to Christian communities, and new and unjustified anxieties to the consciences of married couples; one would also fall into the danger of calling into question the sacramental nature of many marriages of brethren separated from full communion with the Catholic Church, thus contradicting ecclesial tradition." (*FC* 68)

b) *The sacramental dignity of marriage as the object of determining error or of exclusion. Rules for interpretation*

The *first rule* requires a correct interpretation of "sacramental dignity" as found in c. 1099 in relation with cc. 1055 and 1056. An interpreter who cannot explain the precise meaning of the sacramental dignity of marriage will hardly understand the determining error concerning that dignity or its exclusion.

First of all, it is not superfluous to note that the expression "sacramental dignity" is not to be confused with the *bonum sacramenti* of the Augustinian formula: the latter refers to the good of the indissolubility of the bond of marriage and not to that specific configuration with Christ which marriage, as a natural reality instituted by the Creator, produces on the baptised contracting parties. The determining error on indissolubility as well as the exclusion of the same property, considered as error on and exclusion of a property of the bond, are properly considered in cc. 1099 and 1101 respectively. Sacramentality, however, is not a property of the bond but *a dimension of the entire structure of marriage*: the specific participation in the mystery of Christ-Spouse who receives from the baptised the conjugal pact, the bond of marriage, its properties and natural ends. The expression "sacramental dignity of marriage" does not mean the parties' adherence to the contents of the Christian faith, as expressed in the Creed, with the result that the lack of faith in the dogmas and beliefs of the Church would amount to determining error on the dignity of marriage or to its exclusion. In addition to involving a rather crass error of interpretation, it should be noted that, as it is obvious, neither the knowledge nor the acceptance of the theological teachings on the sacramentality of marriage forms part of that minimal knowledge required for a valid marital consent. Furthermore, the parties' belief or unbelief, their participation, indifference, or dislike of the liturgy, which may accompany the manifestation of consent, are not part of the making of the sacrament of marriage by the contracting parties, who are the only ministers. The sacramentality of marriage therefore is not to be confused with either the liturgy or the attitudes of the contracting parties about it.

The expression "sacramental dignity" refers to those concepts that are *exclusively matrimonial*, namely the conjugal covenant, the partnership of the whole of life of only one man with only one woman, and the ordination to the good of the spouses as well as to the procreation and education of offspring, as instituted "from the beginning" by the Creator. Sacramentality adds *no new reality of a matrimonial character* to the marriage between baptised persons but raises the same natural matrimonial reality and introduces it into the supernatural order of the grace of Christ without suppressing, destroying, or replacing the natural matrimonial reality. All that is achieved by the specific incorporation into Christ-Spouse of those persons who, through baptism, had already received the elevation of their own human nature and life to the order of grace and of

their redemption in Christ. Consequently, the sacramental dignity of marriage is manifested in the actions proper of, and normal to, a valid marriage. These are the act of marrying and those usual acts of marital life through which the spouses fulfil their essential conjugal rights and duties and seek conjointly the attainment of the ends characteristic of the marriage union.

To say it differently, in the wedding of Cana, the spouses did not bring, as it were, the water (the natural marriage) and Christ the wine (the sacrament) so that the two substances would remain inseparably mixed into a marriage-sacrament. The spouses rather, and it is crucial to understand this well, contributed with the water that filled the jars, or the rightful intention inscribed by the Creator into the human nature of committing themselves to an indissoluble love and an unconditional fidelity. Christ transformed *the same water*, or natural marriage without reduction or perversion, into the better wine, that is to say, into the grace and the personal condition of sharing in the love that Christ-Spouse has in the Church and in Christ's union with the Church, in which consists the *sacramental dignity* of marriage. Although the natural conjugal pact ("the water") has no intrinsic power to generate the sacramental dignity of itself, marriage does have the capacity to receive that dignity from an extrinsic cause, namely the sovereign power of Christ who has the power to incorporate what is human to the divine. The natural conjugal covenant cannot produce such transformation, but it can be so transformed when it occurs between two baptised persons because a Christian's being and life has been incorporated into Christ through baptism. Therefore, the Christian's nuptial gift and self-giving, in conformity with Christ's designs for marriage "from the beginning," has the aptitude to receive a new configuration in Christ, a gratuitous gift always caused extrinsically by Christ. Due to the indelible character of baptism, the contracting parties, consequently, have no power to prevent the outpouring of the sacramental gift as longs as their naturally valid covenant conforms to the design of the Creator "from the beginning," for that covenant has received, through baptism, the aptitude of being the sign of Christ-Spouse. The only way for a baptised couple to nullify the power of Christ over their marriage would be to fail to contribute "the water" capable of being transformed; that is to say, by entering into a naturally invalid conjugal pact, or covenant devoid of the rightful intention of giving and accepting each other in a partnership of indissoluble love and unconditional fidelity ordered to the conjugal good and to the procreation and education of offspring.

It is Christ's will that, as stated in c. 1055 § 1, the same natural marriage should be endowed, when the contracting parties are baptised, with a new and specific participation in Him who, in addition to the divine filiation received in baptism, configures the spouses to Christ-Spouse of the Church.

The same natural marriage, when contracted between baptised persons, is the *sign* of the union of Christ with the Church. The sign, however, is different from the thing signified and, as the flag is not the country and the baptismal water is not the grace signified, marriage is not, properly speaking, the union of Christ with the Church but only the sign of that union. Nevertheless, it is in the nature of a sign to contain a relation or *nexus* with the thing signified, by virtue of which the sign has the capacity to signify. In the marriage of two persons incorporated into Christ by baptism, the sovereign power of Christ confers to marriage the capacity to signify Christ, the Spouse: the same conjugal pact—the bond of marriage—in its properties and ends, acquire a *nexus* or *vinculum* with the union of Christ and the Church. By reason of this nexus, which raises marriage to the supernatural order of the economy of redemption, the entire essential structure of marriage, as instituted by the Creator "from the beginning," exercises a real and active role in the nature and ends proper to the union of Christ with the Church.

Accordingly, when the Christian spouses, by means of the conjugal covenant, give and accept each other with their own sexual complementariness of man and woman, their mutual self-giving signifies Christ's self-giving to the Church and their mutual acceptance signifies Christ's acceptance of the Church. In this sense, it can be accurately said that Christ is the Spouse of each party. Again, by reason of Christ's double union with the Church through his love and through his incarnation, the *ratum et consummatum* marriage bond becomes a partnership of the common life which, besides being a way of human self-realisation, is also a common way of sanctification or mutual and joint self-fulfilment of a specific Christian vocation, namely the matrimonial vocation. This is why the two ways by which the bond that unites two persons (one man only with one woman only, for life) acquires a special firmness; by reason of their sacramental significance, the natural properties of marriage become connected to the properties of Christ's union with the Church. Consequently when the Christian spouses implement together the unity and the indissolubility of their life's endeavour, at times very laboriously and even heroically, they bring about all the potential grandeur of human love and soar above situations which, from a human viewpoint, may seem illogical and restrictive, and in their quest, the Christian spouses come to share even in the attributes of the divine love as divine grace flows over them and their family. Finally, the natural ends of marriage receive also that signification by which they become incorporated into the purposes of Christ's union with the Church. Because of this connection, classic teaching in the tradition of the Church holds that the procreation and the education of offspring of a Christian marriage is ordered to the increase of God's children and the conjugal good is incorporated into the order of divine love and charity.

Sacramentality—without adding or changing the essential structure of the valid natural marriage—strengthens the same pact (*sacramentum*

tantum), the same bond, its properties and the ordination to its natural ends (*res et sacramentum*), and gives it the power to signify (*res tantum*) the union of Christ with the Church (*res non contenta*) and the corresponding grace to this state of life (*res contenta*).

In conclusion, since the conjugal union that receives a sacramental dignity is the same natural marriage that the Creator established, and since this sacramentality carries no essential conjugal addendum, a baptised person can only block the emergence of the sacramental dignity, a supreme gift of God, by not committing to the essential structure of marriage's natural substance. In regards to the *requisite freedom* explained above, the baptised person freely receives the gift of sacramentality by exercising his or her free will when contracting a naturally valid marriage; in regards to the minimal *requisite faith*, the baptised person's faith is implicitly but sufficiently contained in the party's rightful intention to be committed to an indissolubly faithful and fruitful partnership of love and life, for in that intention the party accepts the will of God the Creator as inscribed in the nature of human sexuality. Therefore, the determining error on sacramental dignity, or the exclusion of the same dignity, which invalidate the marriage between two baptised persons, cannot directly affect the sacramental dignity in an *autonomous or independent* fashion as long as the error or the exclusion *leave intact and complete the rightful intention to contract marriage as instituted by the Creator.*

The *second rule* of interpretation refers to the expression "rightful intention" on the part of the contracting parties as used in *FC* 68. The difficult and confusing meaning of certain statements, on the part of one or both contracting parties, may often give the impression that a particular case may be one of determining error or of exclusion of sacramentality. For instance: "I do not believe in priests nor in the Church"; or "I do not believe in the Church but I choose a Church wedding because of social motives, or in order not to antagonise our families"; or the reasoning that "since I am a non-Catholic Christian, I do not believe in the ceremonies of the Catholic Church but I consent to be canonically married to please my spouse, or for social reasons"; or the argument that "since I lost my faith, I do not intend to confess nor take communion during the wedding ceremony"; and "to me all those formalities and liturgical ceremonies are theatrical gestures for a credulous person, which is not my case"; or again "all marriages, whether civil or religious, are equally mere formalities without any value: only the person's private and personal feelings truly count." In those cases, the investigation must centre on the "rightful matrimonial intention," which may or may not exist underneath those ambiguous expressions; that is to say, the investigation must discover whether *the baptised parties, through their respective consent, committed their entire life to an indissoluble love and an unconditional fidelity in a partnership ordered to the good of the spouses and to the procreation and education of offspring.*

As long as the baptised party had a rightful matrimonial intention at the time of giving consent, the exclusion of sacramentality or the determining error upon the same cannot occur because a marriage's sacramental dignity is a reality that stands independently from the natural conjugal pact, and it is not *another* object of consent added to and different from marriage itself. Besides, as a dimension of divine grace, sacramental dignity can neither be originated nor rejected by the contracting parties who wish to contract a valid marriage. Consequently, there cannot exist a valid conjugal covenant between two baptised persons which is not, at the same time, a marriage endowed with sacramental value and, in this marriage-sacrament, no harm is done to the freedom of the parties and no unconscious and automatic reception of the gift of sacramentality takes place. The rightful matrimonial intention on the part of the persons marrying means that, by wanting the same conjugal pact instituted by the Creator "from the beginning" with all its integrity, those persons constitute, by their consent, the *res* or natural reality of marriage which, according to the economy of Creation, is inscribed in the rightful human love of the spouses. This openness and disposition of the will, on the part of the marrying parties, to the will of the Creator cannot exist without divine grace. Since a person's faith is found in many and profound degrees, the "rightful intention" to give and accept each other in a love that is indissolubly faithful and fruitful implies a real and practical faith in the will of the Creator as this will, which is inscribed in human nature, is freely accepted by the contracting parties' rightful intention to enter into their project of conjugal love. This reality, established by the Creator and freely chosen by the contacting parties, is the "water" in the jars and the *same* reality that Christ chooses to transform into wine, by his sovereign power, that is to say, a participation in his being as belonging to Christ-Spouse.

The *third rule* of interpretation requires a determination, in the particular case being examined, of whether the manifestations contrary to the faith, to the Church, or to the sacraments, especially the sacrament of marriage, contain doctrinal and practical errors or subjective motivations and designs intrinsically affecting the rightful intention of marrying according to the Creator's will inscribed in the nature of man and woman. Also whether the error or motivations, having perverted that intention in some essential aspects, are in fact *causae simulandi* or manifestations of a will to contract without the bond, its properties, or its ends.

When a rightful conjugal intention exists, motivations such as family and social reason are irrelevant, even if they are the prevalent or *causam dans* motives for choosing to marry in the Church. However, we would have a case of total simulation if the social motivation *simply fills* a vacuum or absence of the right conjugal intention or, in other words, if there is no matrimonial will under the nuptial sign before the Church but, taking the place of that will, there is *only* the intention for the sign. This type of marriage would be null because of a defective consent which

excludes marriage itself, and not because of any statement contrary to the faith or to sacramentality. In the majority of cases, those statements express a rejection of the religious liturgy or of the faith in the Church-institution mixed with confused notions about the true meaning of sacramentality. Nevertheless, it is not infrequent to find that, under diverse and confusing manifestation of lack of faith in the Catholic religion, wrongly understood and often mistaken by the liturgical formalities or by some marriage and family religious practices, a deficient will to contract does exist. The spiritual impoverishment that the loss of faith causes may lead a person to positively intend, under the nuptial sign desired by "social reasons," a relationship deprived of a bond formed by juridical rights and obligations, of one of the properties, or of one of the ends. In those specific situations of simulation, the "social reasons" would be, strictly speaking, the *causa celebrandi* and the "lack of faith" would be the *causa simulandi*.

The *fourth rule* refers to the explicit and formal rejection of sacramentality as described in the important text of *FC* 68: "However, when in spite of all efforts, engaged couples show that *they reject explicitly and formally what the Church intends to do when the marriage of baptised persons is celebrated*, the pastor of souls cannot admit them to the celebration of marriage. In spite of his reluctance to do so, he has the duty to take note of the situation and to make it clear to those concerned that, in these circumstances, *it is not the Church that is placing an obstacle in the way of the celebration* that they are asking for, *but themselves*."

Let it be noted first that the text of *FC* just quoted does not explicitly mention sacramentality which, however, is understood to be implicitly included in the text's mention of the explicit and formal rejection of *what* the Church intends *to do when the marriage of baptised persons is celebrated* and in the reference to the fact that it is not the Church but the contracting parties themselves who *place the obstacle* to the celebration.

The first and wider meaning of the text includes those contracting parties who, by their expressed and formal rejection of "what the Church intends to do," they in fact reject the conjugal covenant, as established by the Creator "from the beginning." By formally and explicitly manifesting their rejection of the conjugal covenant, of marriage itself, of its properties, or of its end, it is evident that the parties themselves, and not the Church, place an obstacle in the way of the celebration because they seek a false nuptial sign in the ceremony that they request. If in spite of this express and formal rejection, the celebration takes place, the case falls within the exclusions of c. 1101 § 2.

The second and more restricted meaning of the text includes those cases of explicit and formal statements against the sacramental dignity of marriage, since it is obvious that "what the Church intends to do when the marriage of baptised persons is celebrated" is also to confect a sacrament. However, as reiterated above, express and formal statements against sacramentality are irrelevant as longs as the baptised persons desire, in

fact, to contract a marriage that conforms to the one established by the Creator, namely a life and love partnership that is indissoluble, faithful and fruitful. Consequently, the formal and express rejection of sacramentality invalidates only when one or both contracting parties positively intend, through those statements, to establish a conjugal relationship that is *in itself incapable* of receiving the gift of sharing in Christ-Spouse and in the graces corresponding to the marital state of life.

The inability of the conjugal relationship to receive the matrimonial configuration with Christ can only be brought about by the baptised parties who voluntarily demolish the essential structure of marriage through one of the following ways: firstly by the substitution of the conjugal covenant with a void nuptial sign, which impedes the formation of the conjugal bond itself; secondly by causing a *short circuit*, as it were, in the connection between the natural conjugal order and the order of grace, thus blocking the access of the natural reality into the supernatural order and impeding the supernatural elevation of the natural conjugal union, which the Creator initiated with the institution of marriage and the will of Christ established *ex opere operato*. Along this second path, the contracting party can sever the signifying nexus that runs in a two-way direction: in the direction running from the nature of the conjugal reality to the sacramental sign, the parties can intend a type of man and woman relationship which, devoid of the properties or of the ordination to marriage's proper ends, cannot signify the union of Christ with the Church. In the direction running from the sacramental sign to the valid constitution of marriage, the parties can sever the connection by opposing the sacramental sign in such a way as to voluntarily block the grace of the configuration with Christ of the natural conjugal reality. The natural structure of the latter disintegrates when the parties, whose own nature has been raised by baptism, contradictorily pretend to remain in the natural order of things. For, indeed, when the baptised parties act against their own elevated nature, as acquired in baptism, and they deny to their conjugal union its capacity to signify Christ-Spouse, the natural conjugal order does not remain intact but collapses in its very core. From the technical viewpoint of the defects of consent, this efficacious opposition to sacramentality requires an explicit positive act of the will which can be generated from the party's self-determination or can originate, under certain conditions, in the party's practical intellect.

c) *The so-called* prevalent will *in the exclusion of sacramentality*

In order to effectively neutralise the sacramental aptness of the natural conjugal pact, bond, properties, and ends, which is received with baptism's indelible configuration with Christ, the will of the baptised contracting party must positively degrade the essence of the natural conjugal pact, bond, properties, and ends. In other words, the contracting parties must "fill the jars," as it were, with "polluted water" so that they themselves and not the Church, as the text of *FC* 68 acutely notes, impede

the transformation of the natural water into wine. It is not within the power of the baptised party to decide *to enter a true marriage* and resolve, at the same time, that the valid marriage is not to be *eo ipso* a sacrament, as c. 1055 § 2 reminds us. Presupposing then the inseparability just mentioned, an intention contrary to sacramentality on the part of the baptised person, who truly and positively intends that the valid marriage is not to be a sacrament, should be a prevailing intention, interiorly and expressly, over his or her nuptial intention. It should amount, in other words, to the following: "if my marriage is to be a sacrament against my will, then I prefer not to marry rather than to consent to or accept the sacrament." This description of an expressed will against sacramentality is called a *prevalent will*.

The psychological mechanism of the prevailing will shows, at least, that the person who does not want sacramentality in any way whatsoever is logically bound, due to the inseparability of the valid pact from its sacramental sign, to reject the entire marriage/sacrament and to totally or partially exclude the essential structure of marriage. In that sense, the so-called *prevalent will* is the psychological form, to describe it in phenomenological terms, taken by the rejection of sacramentality as *causa simulandi*; expressing it in canonical terms, the rejection of sacramentality is the motive *causam dans* of the positive act of exclusion of marriage itself, of one essential element, or of the properties, as formulated in c. 1101 § 2.

The two ways of rejecting sacramentality described above can be included within the different modalities of simulated consent, and for this reason, a majority of those within canonical doctrine holds that the baptised party's express and formal exclusion of sacramentality either conceals one of the forms of the exclusions of c. 1101, within which the *causa simulandi* operates, or is inefficient and irrelevant if the external expression against the sacrament co-exists with the rightful intention of being committed to a love and life partnership indissoluble faithful and fruitful. For this reason, the exclusion of sacramental dignity that first appeared in the 1980 *schema* as an "autonomous" exclusion was not adopted in the final text of c. 1101 now in force, thus maintaining the old tradition received in c. 1086 of *CIC*/1917.

d) *The error about sacramentality that determines the will*

We can now understand the apparent paradox that the error about sacramental dignity is formulated as an autonomous invalidating error in the canon under study (as it was in c. 1084 of *CIC*/1917) while not being included in the autonomous forms of exclusion of c. 1101 (as it was not included in the former c. 1086).

As we saw in relation with the prevalent will, the will cannot reject sacramentality and establish, at the same time, a valid marriage; the "exclusions of sacramentality" in appearance only are really motivations or reasons leading to simulation (*causae simulandi*) and are not to be

identified as acts of exclusion nor as objects excluded, for the act of exclusion must refer to the pact, to the bond, to its properties, or to its ends. Simulation under any of its modalities is always a positive act of the will and, therefore, a defect of consent originating in the self-determining power of the will, but when the legislator regulates the acts of simulation by means of laws concerning excluding acts and excluded objects carrying an invalidating effect, he does not go into that very wide field of motivations which, provoking and explaining the positive act of exclusion, are however antecedents which do not determine the will. For this reason, the so-called "will to exclude sacramentality" that is, in reality, a motivating factor or *causa simulandi* is not to be counted, as in fact it is not, among the properly called exclusions of the text of c. 1101.

In contrast, the determining error of c. 1099 operates along different lines: in this error the will is determined toward the object by a factor outside itself, namely the intellect which, by way of the cognitive contribution that the will requires, leads the will to that determination. While c. 1101 refers to self-determined acts of the will, c. 1099 considers, rather, the "moment," prior to the positive act of the will, in which the practical intellect contributes with the knowledge of the possible options from which the person makes then a specific choice. As sufficiently explained before, when the practical judgement provides information containing only one option, the will is determined toward the only available object since there is no other. In c. 1101 § 2, the legislator does not list the possible motives of simulation because these are not positive acts of the will, but it defines the objects being excluded. In c. 1099, the same technical reasons prevail, that is, the needless enumeration of simple or motivational errors is avoided but the canon defines the objects of error that invalidate consent when the will is determined by them. Consequently, when in the practical judgement of the intellect all that a person knows is an essential error about "sacramental dignity," then the error determines the object of marital consent and this consent is null.

The first precaution that the interpreter must take when judging determining error is not to mistake it for a simple error about sacramentality. It must be noted in this regard that *the determining error about the dignity of marriage must affect the essential structure of marriage, even if by way of sacramentality, and must wound it substantially.* Since this requirement is an obvious one, the legislator need not add the adjective "essential" to the text of c. 1099 because the reason for the invalidating effect of those errors affecting consent is that all of them damage, in law or in fact, the substance of marriage. Such is the case of ignorance and substantial error of c. 1096, by which the person's intellect fails to contribute with the minimal *substantial* true knowledge about marriage. The same thing occurs with the error of fact about the physical identity of the other contracting party of c. 1097 § 1, which is a *substantial* error

about the person. Likewise, the error about a quality directly and principally intended (*see* commentary on c. 1097 § 2) invalidates marriage because, even though it refers to a quality, the will of the contracting party turns it into *substantial.*

It is not necessary to explain that the determining error of c. 1099 on one of the properties of marriage must be an essential error, for those properties are indeed *essential* and the error about them directly wounds the bond itself. In the error about the sacramental dignity, then, *the essential structure of the marriage between baptised persons ought to be necessarily wounded,* for otherwise the error would refer to an accidental object not involving the essence of marriage, neither *de iure* nor *de facto* and the essentials of marriage would still be a possible object of the will's power of self-determination. It would be, in other words, an *error simplex* which canonical tradition has always regarded as irrelevant.

Having extensively explained what is to be understood by sacramental dignity, as an object of error and as an object of exclusion as the case may be (*see above* no. 9, b), now we can present in a synthetic fashion the criteria that identify the determining error about sacramental dignity:

First: the nexus between natural marriage and its sacramental elevation does not require that the consent of the baptised should include another act of the will, as if this consent should be formed by two voluntary acts over two different but inseparable objects, one for the contract and another for the sacrament or "sacramental dignity." As insistently repeated above, following the felicitous clarification of *FC* 68, *only one decision is sufficient, that of choosing to marry in accordance with the design inscribed by the Creator in the complementary nature of man and woman,* that is to say, the will to establish a partnership of the whole of life ordered to the conjugal good and to the procreation and education of children. For this decision "*really involves, even if not in a fully conscious way, an attitude of profound obedience to the will of God, an attitude which cannot exist without God's grace*" and by which the spouses do not impede but accept, at least implicitly, that a natural valid marriage should acquire the sacramental sign and be related to the union of Christ and the Church.

Second: The intention *not to obstruct the rise of the nexus of sacramental sign* is, in a certain sense, a part of the object of the matrimonial consent between baptised persons when they establish the essential structure of marriage. Note, however, that a direct and express choice of sacramentality, in addition to the choice of the conjugal union, is not a necessary part of the object of consent, the reason being that sacramentality does not arise from the power of the contracting parties but from the power of Christ. For marriage to be a sacrament, it is sufficient that the baptised abstain from introducing in the object of their consent a voluntary element that is *new, extraneous, and anomalous to normal consent* and directly and expressly aimed at obstructing the rise of the sacramental

sign. When this occurs, the consent between the baptised, which otherwise would be "naturally sufficient" to establish a marriage with sacramental sign, is infected by an *intrinsically unnatural element which, being anomalous and extraneous to consent, causes it to be invalid.*

Third: The intrusion into the act of consent of an extraneous and anomalous invalidating element can occur by way of the free self-determination of the will (the contracting party chooses and desires it), or by way of that determination which the intellect can provoke over the object of the will (the contracting party inevitably wants the only known option and has no other choice). The first case is one of simulation and the second one of determining error. Therefore, the distinction between the different forms of exclusion (c. 1101 § 2), by rejecting sacramentality or by determining error about sacramental dignity (c. 1099), is a difference of concepts deriving from the roles that the intellect and the will play in the formation of consent.

Fourth: When the intrusion into marriage consent of a choice directly and expressly opposed to sacramental dignity is provoked by the person's free decision, the case falls necessarily within the framework of simulated consent of c. 1101 and within those specific objects which, if excluded, produce invalidity as defined in § 2. In the genesis of this positive act of the excluding will, the intellect can supply either the error or the truth about sacramental dignity.

When the intellect supplies the error, the simulator knows, by definition, what she or he desires and excludes, even though the person simulating may not know that the thing chosen and desired is an error, objectively speaking, and that the marriage contracted under that condition is invalid in the technical/juridical area. It is, therefore possible that a simple error about sacramentality (an error that does not determine the will) may act as a motive of the positive act of exclusion. For instance, a baptised party wrongly believes that sacramentality is the same as indissolubility, a religious and moral obligation that concerns believers but that non-believers are free to adopt or not. Although he has lost his faith, his believing spouse wants to marry forever and urges him to marry before the Church because the marriage will then be an "indissoluble" sacrament. Due to his error about sacramentality, he chooses and wants to contract according to the canonical form but, contrary to his spouse's attitude which he knows but rejects for himself, he desires no sacramental marriage but one "without religious obligations," as in a civil marriage because, due to his lack of faith, he wants to retain his right to divorce. In this case, the error about sacramentality is the motive for the real exclusion of indissolubility in such a way that the naturally valid contract, *eo ipso* capable of a sacramental sign, is not established.

When the intellect supplies the truth about sacramental dignity, the simulator is not in error but, knowing the truth about sacramentality, does not desire it for his or her marriage. If the contracting party knows the

truth *without error*, the same party knows that, among the baptised, the signifying nexus arises *eo ipso* (c. 1055 § 2) from the valid conjugal contract and, if knowing the objective truth, the person wants to exclude sacramentality when contracting, then the contracting party necessarily excludes a true marriage. In these cases of true knowledge of sacramentality with a prevalent will to reject it, the contracting party shuns the conjugal bond or, more frequently, the party holds back consent, by means of positive acts, to those essential matrimonial elements that are more closely related to sacramentality, which the party positively rejects.

The key point of reference to identify those situations as nullifying the marriage is the fact, that must be proven, that through the motives (erroneous or not) leading to the rejection of sacramentality, the party actually wanted, despite the nuptial sign, to positively exclude consent itself, the conjugal bond, its unity or indissolubility, its ordination to the conjugal good or to the procreation and education of the children, or one of the essential matrimonial rights and duties that derive from the bond, its properties, and its ordination to the ends. Since the sacramental sign is, ultimately, shared by all those essential conjugal realities, the person's voluntary rejection of sacramentality, accompanied or not by error, either provokes, in the end, the free decision to exclude those realities or it is irrelevant by reason of the fact that *the "valid" contract is* eo ipso *a sacrament between the baptised* (c. 1055 § 2).

Fifth: Finally, when the anomalous element contrary to sacramentality intruding into the act of consent is caused by a determining error through the will's dependence on the intellect, the fundamental outcome of this process is fundamentally different from the types of simulation resulting from the situations described above, as we shall now explain. In the case of determining error, the contracting party is inexorably compelled to want a false matrimonial object; this is so because sacramental dignity is truly a dimension of the conjugal contract naturally valid which, from the moment of being constituted (*in fieri*), comprises the bond, its properties, its ends, and the essential rights/duties which derive from it. Consequently, when a determining error on sacramental dignity objectively affects those elements, the contracting party consents, in spite of not knowing it, to a matrimonial object that is essentially false; although unknowingly, the person is determined to contract invalidly.

In order to identify the determining error on sacramental dignity, the following elements, which need be proven, are to be taken into account in each particular case: First, the contracting party must *have laboured under an error on the sacramental dignity* of marriage, which means that it must be proven that the person contracting did not know his or her error. Second, the constituent nature of the error about sacramentality must be identified, not confused and vaguely, but correctly defined because it must be demonstrated that *the specific error essentially contradicted, either directly or indirectly, the substantial structure of*

marriage, namely the valid contract, the bond, the properties, the ends, or the rights/duties deriving from the contract. Third, *the error must have been such as to have determined the will*, which implies that, through the person's life circumstances preceding consent, it must be proven that the whole range of information about sacramentality in the person's practical judgement contained *false information only* and that such information was passed on to the will during the time of elaboration of the specific consent. When the person knows no other option, no deliberation and no personal selection among options are possible, for if the person had been able to elaborate a true practical judgement, there would have been deliberation, that is to say, the person's practical intellect would have been able to assess another possible object of the specific consent to be given *hic et nunc*, in which case there would have been a choice of the will, for the will determines itself; and if the error about sacramentality contrary, in some ways, to the essence of marriage had been chosen, then this essence would have been the object of the voluntary act of exclusion as in c. 1101 § 2. Concerning the notion that the practical intellect may contain "false information only," this does not refer to information consisting of one single erroneous *fact*; it refers, rather, to the fact that if *all* that the person knows about sacramentality in the conjugal order is essentially false, including the several false options that the person may know, consent will always be determined *ad falsum*: due to the person's life circumstances, his or her practical intellect may contain a collection of different errors forming *a false conceptual complex.*

1100 Scientia aut opinio nullitatis matrimonii consensum matrimonialem non necessario excludit.

Knowledge of or opinion about the nullity of a marriage does not necessarily exclude matrimonial consent.

SOURCES: c. 1085

CROSS REFERENCES: cc. 1055, 1057, 1101

COMMENTARY

Pedro-Juan Viladrich

1. *The factual framework and definition of terms*

This canon completes the set of rules whose common denominator is the fact that the intellect has its own contribution to make to the act of the will in the formation of valid consent (*see* commentary on c. 1096 to 1100; for the general hermeneutical principles, *see* commentary c. 1096, § 1). Specifically, this canon comprises those situations in which one or both spouses reach the moment of contracting with the conviction that the marriage about to be established is null ("scientia aut opinio nullitatis") but they, nevertheless, express consent in their wedding ceremony.

By "scientia nullitatis" is understood the subjective state of certainty about the truth of an assertion which the person asserting does not question because of the strength of the subject's own interior assent and because of the reassuring firmness of the objective arguments supporting the assertion. The "opinio nullitatis" is a manner of thinking, believing, or feeling by which the person's subjective view or conviction is reflected in the assertion rather than a firm certainty that the contrary statement cannot be objectively true. Since the latter implies a lesser degree of assurance, whatever we say about the state of certainty is *a fortiori* valid for a mere opinion.

2. *Rules of interpretation. The motivating effect of the* "scientia aut opinio nullitatis" *as a cause of simulated consent and as a cause of conditional consent*

The question is as follows: do the subjective states of certainty and opinion, caused by the contribution of the intellect, necessarily and always prevent the person's will from providing a true consent so that the

"scientia aut opinio nullitatis," by at least one of the parties, is by itself an autonomous cause of nullity?

In answer, c. 1100 very skilfully provides three rules: The first rule directly points out that a party's certainty or opinion, whether objectively true or false, about the nullity of the marriage being contracted does not impede the person's consent, which means that the "scientia aut opinio nullitatis" is never, by itself, an autonomous cause of nullity. The second rule indirectly indicates that the nullity of the marriage thus contracted does not derive, at any rate, from that certainty or opinion but from the diriment impediment, the defect of form, or the defect of consent to which the contracting party's "scientia aut opinio" referred to. The third rule, also an indirect one, shows that a person influenced or motivated by the certainty or the opinion about the nullity of marriage may still decide to express consent in the wedding ceremony but not to consent in fact, which should lead us to consider the same person's positive act of exclusion foreseen by c. 1101 § 2. We may add that if instead of "scientia nullitatis" the party holds an opinion not free from doubts, such doubting "opinio nullitatis" can be the motive for conditional consent, in which case the discipline of c. 1102 would apply and the marriage would be null by reason of simulation or condition but not because of the "scientia aut opinio nullitatis" that motivated those states of the mind. We can therefore conclude that c. 1100 sets the legal bases for considering the "scientia aut opinio nullitatis" as a cause of simulation or, in the case of a doubting opinion, as the cause of the condition.

Considering, then, that the "scientia aut opinio" can be a motivating cause of simulation or even of conditional consent, it seems reasonable for the legislator to have systematically placed this *fattispecie* at the end of the discipline on error and at the threshold of simulation and condition.

3. *Not an autonomous* "caput nullitatis"; *its difference from determining error*

The rules of interpretation discussed above allow us to distinguish the "scientia aut opinio nullitatis," which is never by itself an autonomous ground of marital nullity, from the defect of consent, the defect of form, or the diriment impediments to which the certainty or the opinion may refer and which are, therefore, the real causes of the marriage nullity. With those rules, we also avoid mistaking the psychological mechanism of the "scientia aut opinio nullitatis" with that of determining error of c. 1099. It is true, however, that as both situations constitute states of the intellect, they can form the party's practical judgement proposing one exclusive option to the will, but apart from this similarity, their differences are essential and definitive. The key to the interpretation of this canon is not to forget that its discipline follows the principles concerning the connection existing between

intellect and will according to which not all that is contained in the intellect or forms its particular condition is necessarily wanted by the will; *a fortiori*, then, when the objects of the intellect and of the intention are different, that psychological mechanism by which the choice of the will is determined by the practical intellect cannot take place.

In cases of determining error, the object of the practical intellect and the object of consent are the same, namely the conjugal bond with its properties and its sacramentality, but the manner by which the practical intellect and the will apprehend the same object is different: the intellect apprehends the object as something understood and the will apprehends it as something wanted. Consequently a person's will can be determined in the choice of the bond only when the practical intellect knows no other bond but a false one (see commentary on c. 1099). The object, however, of the "scientia aut opinio nullitatis" is totally different from the object of consent, for the certainty or opinion refers not to the one, indissoluble, and sacramental conjugal bond itself, but to an intellectual qualification concerning the nullity of the act establishing the bond. Bond and nullity are two different realities, the latter being an intellectual qualification but not an intended object so that insofar as that nullity is *as an intellectual qualification, it can never be an act of the will nor the object of consent* which is the one, indissoluble and sacramental bond to be established here and now. Consequently, since the specific facts (*fattispecie*) that form the object of the "scientia aut opinio" consist of a qualification of the practical intellect about the inefficacy of the act of consenting, and since the object of the will is the bond intended, the determining effect of the error foreseen by c. 1099 cannot take place: the state of certainty or opinion, whether objectively true or false, about the efficacy of consent can never determine the will toward an object, such as the specific bond, which is not the object chosen and wanted by the will. Therefore the highest possible degree of relevance that the "scientia aut opinio" can have is that of being a motive inducing the contracting party to either exclude or condition consent or, the motive notwithstanding, to consent fully and unconditionally.

4. *Relevance of this canon in the validation of marriage*

Real life very often shows that a person may exercise his or her self-determination in ways that go beyond or even against his or her convictions or opinions, whether these be objectively true or false. Because of a number of reasons, mainly the great power of passion, one or both contracting parties may want to be married even knowing that there exists, for instance, between them an impediment of a prior conjugal bond, of consanguinity, a condition of impotence or of abduction, or that no competent priest is available to act as a qualified witness, and yet in spite of,

or even against, all those obstacles, including the most fundamental precepts of divine law on marriage, the party or parties may still intend to establish a conjugal union. Or it may happen that one or both parties may be mistakenly but totally certain, and not just suspect, that the marriage contracted is invalid because they lack parental permission, or the five witness required, or because they refuse to confess and receive communion in the wedding ceremony, or the bride is sterile, and yet none of these erroneous convictions, or other doubts they may have about the truth of their opinions, prevent them from wanting to be united in marriage. In all those situations, the contracting parties want or consent to something that is beyond or contrary to their certainty or opinion because, at times, their desire for the conjugal union is much stronger than their willingness to submit to the prohibitions and obstacles which thought, that are truly or falsely, to invalidate marriage; or it can also happen that a person, being aware of the "impossibility" (i.e., nullity) of marrying before others, or even before God, wants so "desperately" to be married that he or she continues to hope, aware even of the utopia of those dreams, that something magical will occur in favour of validity, or that the marriage that is thought to be null now may later be considered valid.

That the distinctions of c. 1100 are not convoluted nuances is made clear by its statement that from the "scientia et opinio nullitatis" no exclusion of consent automatically follows, thus leaving open the possibility that one or both spouses may have elicited a "naturally sufficient" consent in a marriage affected, in actual fact, by a defect of consent, a diriment impediment susceptible of ceasing in time or of being dispensed, or a defect of form that can be dispensed. In those cases, the existence and perseverance of the consent "naturally sufficient," even if juridically ineffective, is of great importance for the eventual application of the general institute of validation to a great variety of situations, either by means of simple validation (cf., e.g., c. 1159) or by *sanatio in radice* (cf. in a general way cc. 1156 a 1165). In addition, the canon leaves open the possibility that sufficient consent may have existed in a marriage contracted, by one or both parties, with the erroneously belief, at the moment of consenting, that a cause of nullity existed.

1101 **§ 1. Internus animi consensus praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis.**

§ 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum vel matrimonii essentiale aliquod elementum, vel essentialem aliquam proprietatem, invalide contrahit.

§ 1. The internal consent of the mind is presumed to conform to the words or the signs used in the celebration of a marriage.

§ 2. If, however, either or both of the parties should by a positive act of will exclude marriage itself or any essential element of marriage or any essential property, such party contracts invalidly.

SOURCES: §1: c. 1086 §1
§2: c. 1086 §2; SRR Decisio coram Anné, 8 nov. 1963 (*SRR Dec* 55 [1963] 764); SRR Decisio coram Lefebvre, 19 feb. 1965 (*SRR Dec* 57 [1965] 176)

CROSS REFERENCES: cc. 1055–1057, 1095, 1100, 1104, 1107

COMMENTARY

Pedro-Juan Viladrich

1. *The factual setting of "simulated" marriages*

Feigning, simulating, falsifying, pretending, implying what is not true is, unfortunately, part of the condition of human communication. Insofar as the wedding ceremony is a public expression of consent, it is an act of communication. As such, the contracting party who feigns a non-existing matrimonial will to commit or declines to accept the complete essence of the conjugal union can falsify it. Lack of truthfulness in the consent manifested by the marriage vows is the common denominator of the variety of factual situations regulated by c. 1101.

The majority of doctrinal and jurisprudential writings use the term "simulated" consent to identify the false marital vows. This term enjoys a multi-secular tradition among jurists because it refers to an essential factor on the part of the deceiving party, namely, the wilful pretext of something that does not exist. The canonical legislator, however, does not use that term in the present text of c. 1101 nor did he use it in the old c. 1086. By this intentional omission, the canonist is warned not to confuse the cause of nullity, or technical structure of the *caput nullitatis*, with the

many and changing ways of simulating or, even worst, not to convert one particular set of "simulating" facts into the only paradigm and *sine qua non* internal structure of the *caput nullitatis*. This can, indeed, happen because in the non-expert use of the term "simulation", it sometimes denotes a particular sly, artful, astute or tricky way of falsifying the marriage vows which is not the only way of producing the causes of nullity of consent foreseen in c. 1101. The exegesis of this canon requires, therefore, a distinction between the structure of each *caput nullitatis* and the diverse ways, or situations of fact, that can lead to the actual cause of nullity. The structure of each cause of nullity is constant and permanent but the factual ways are as varied and unpredictable as there are individual human beings.

The ultimate reason for the great variety of "simulators and simulations" is the fact that simulated consent is the *photographic negative* of true consent. The same versatility of the ways by which the consenting parties can give the true consent of c. 1057 is duplicated by the miscellaneous ways of simulating according to the norms of c. 1101. The latter canon depends essentially on the former: the systematic structure and the contents of the two paragraphs of c. 1101 depend, as in the negative of a photograph, on the arrangement of c. 1057. The canonist should start with the internal symmetry that exists between the two canons and resolve the problems of interpretation of c. 1101 under the light of c. 1057.

2. *The building blocks of valid consent*

According to canonical tradition, as synthetically expressed in § 1 of c. 1057, the power to establish the conjugal union belongs exclusively to the consent of the contracting parties so that any other power or human volition is ineffective in that regard. The contracting parties' efficient consent comprises each party's internal will, however efficient consent and internal will are not to be confused. This may be explained by using a very close analogy taken from human biology: the individual internal wills of the man and of the woman act like the male and female gametes that unite for the conception of human life; separately they cannot form a new living being but they can do so by the specific joining that includes and fuses them. In a very similar fashion, efficient marital consent consists of a specific joining of the two parties' wills—the man's to the woman's. When seen as a joining, efficient consent is a consensual unitary reality with a manifold internal structure including several elements: *a) the two wills* of the two sexually diverse persons, the man's will and the woman's will; *b)* the two persons' mutual self-giving and other-accepting in the *totality of their diverse and complementary sexual condition specifically ordered to establish the conjugal partnership* defined by c. 1055; *c) one single sign* capable of uniting the two parties' wills, of communicating the enactment of that union to each other, and of being recognized as nuptial

sign by the Church. As we shall see, simulation destroys the unity of the parties' internal wills, the integrity of its conjugal contents, and the recognizable nuptial vow.

a) *Efficient consent and "internal" consent: correlation between the duality of wills and the unity of the marriage pact*

One may wonder about the different meanings of the term "consent" as used in c. 1057 and in c. 1101: in § 2 of c. 1057 and in all of c. 1101. The term is defined as the act of the will of each contracting party, that is to say, as the willfulness of the act of self-giving and other-accepting or, to say it in a more conventional and synthetic way, as internal will. This internal will is not the efficient consent of § 1 in the same c. 1057 because for the internal will to have the power of establishing marriage, it must be legitimately manifested by each contracting party, both of whom must be juridically capable persons. Without that capacity, or without its legitimate manifestation, the internal act of the will is not the efficient cause of marriage. Consequently, in the term "consent" we must distinguish two meanings: consent understood as the person's internal will and consent as meaning the matrimonial pact or covenant ("foedus matrimonialis," of c. 1055, § 1). In actual fact, internal will and matrimonial pact are two phases of the same process of forming the efficient cause of marriage.

b) *The sign, or wedding ceremony, is not an independently intended object in valid consent, but it is so in simulated consent*

Marriage implies a specific reference to the sexual composite of the male and female bodies to the point that it can be said that the spouses are co-owners of their bodies' sexual modality. With that in mind, it can be seen that the establishment of their marital union cannot be less corporal than their very personhood which requires the spouses' bodily presence at the moment of establishing the union which they accomplish by means of a perceptible or *sensible* nuptial sign (as well as by consummation in what refers to the perfection of the sacramental sign). In this regard, it is crucial to note that the required mutual communication, or physical expression, of the two internal wills through an external sign is an intrinsic aspect of the willfulness of the conjugal giving and accepting. For this reason the visible and bodily communication (the nuptial sign) requires no new act of the will different from the act of consent itself and is not a new and independent object of consent. In that sense, the spouses' *will to conjugally give and accept each other* implies, as an aspect proper to and intrinsic to that will, the act of mutual communication (cf. c. 1057 § 2) of the giving and accepting, a communication that amounts to an incarnation of that will into a *sensible and unequivocal nuptial sign.*

Consequently, valid consent is not formed by two acts of the will, one giving and accepting the conjugal content in all its integrity and another wanting the external wedding ceremony. On the contrary, each contracting party elicits one single conjugal act of the will, which *includes* the

entire sequence of the mutual giving and accepting of each other as spouses. The same and single act of the will includes also, as part of that sequence, the *required sensible and mutual communication* of the spouses' gift of self and its acceptance as persons embodied in their own sexual modality. The fact that the giving and accepting of the masculine and feminine self is corporal/sexual, demands, *by its own nature*, a physical, visible manifestation which, being an act of *bodily communication*, *unifies* the two parties' internal wills in order to achieve their conjugal union. The unity of the two internal wills is, therefore, accomplished by virtue of the unifying and communicating force of the formal act of manifesting consent. The sign of the agreement, which is perceptible because it is embodied in words or equivalent signs, must also be recognizable by the Church community as an unequivocal agreement establishing the marriage.

c) *Common nature and congruity between the nuptial sign and the contracting parties' marital consent*

With the understanding that the nuptial sign is the manifestation phase of the contracting parties' will to become spouses, we can now see that the wedding ceremony is a *connatural dimension* of the one single object of matrimonial consent and not a new, different, and independent object in the contracting parties' will. The spouses' act of manifesting their internal will to each other, through a visible sign, forms the two sides (willfulness and manifestation) of the one and same reality, namely efficient consent. Nevertheless that common nature between willfulness and visible manifestation is *the basis of the congruity that must exist between what is truly wanted and what is externally manifested* to which § 1 of c. 1101 refers, by means of a presumption *iuris tantum*, in symmetry with the required "legitimate manifestation" of § 1 of c. 1057 for efficient consent.

If the manifested consent is connatural with the same and single process of the parties' internal conjugal will, then the "legitimate manifestation" (c. 1057 § 1), or external nuptial sign, should congruently correspond to the interior will (c. 1057 § 2). This principle of congruence between the two paragraphs of c. 1057 is at the basis of the presumption of c. 1101.

d) *The integrity of marital consent*

Canonical marriage contains the essential truth about marriage in all its integrity on which the discipline c. 1101 firmly rests. This occurs in two ways: First, the conjugal contract must be a true one, in the sense that it must be the external sign of the true internal will of each party's intention to be conjugally united (*animus vere maritalis, intentio contrahendi*) so that if the contract manifesting the sign is devoid of that internal will, the contract is null. Second, the internal will must include the giving and accepting of the essential structure of marriage in all its integrity, namely, the one partnership of the whole of life ordered to the conjugal good and to the procreation and education of offspring. These essential contents of the contract correspond to the truth about the conjugal complementariness

of man and woman, a natural content that is raised, between the baptized spouses, to the supernatural order of grace and of Christian redemption. Therefore, if the party's internal will, externally manifested by the nuptial sign, does not positively contain the entire essence of marriage (the one and indissoluble bond and the right ordination to the matrimonial ends), the conjugal pact, in this case, in spite of its external appearance, falsifies the truth of marriage and results to be a false nuptial sign and, consequently, it is null.

e) *The disintegration of the nuptial sign and the inefficacy of the consent* "ore tantum seu verbis"

By misusing the external elements of the nuptial sign, human beings are, unfortunately, capable of deceiving others concerning their own true internal intentions. Besides, the wedding ceremony, as a mere sign, is not the same thing as the will to marry but only the manifestation or the perceptible means that communicate that will outwardly. Therefore, the external sign alone, devoid of any contents, is irrelevant and has no real efficient power. Intending only the external sign, or wedding ceremony, but not the conjugal union that the sign signifies amounts to simulation or the *voluntas falsum enunciandi*. The wedding, as a social and external sign deprived of the internal will of giving oneself and accepting the other, is not the sufficient object of valid consent and the person whose will is limited to exclusively pronouncing the nuptial vows (*ore tantum seu verbis*) does not contract marriage. To say it in a more practical way, a person does not contract a valid marriage if he or she *wants only the wedding ceremony* for the purpose of attaining, thanks to the wedding's juridical and social effects, sexual access to the spouse, his or her wealth or social position, or any other personal interest and benefit, but *with no internal will to giving oneself and accepting the other* truthfully in a partnership of the entire life ordered to the conjugal good and to the education of offspring. The reason for the invalidity is that such person celebrates a wedding ceremony devoid of conjugal truthfulness.

Anticipating the eventuality that the "legitimate manifestation" of consent in the wedding ceremony may be a mere external sign devoid of true internal will to marry, the legislator sanctions the principle of congruence between § 1 and § 2 of c. 1057 by formulating it in c. 1101 § 1 as a presumption *iuris tantum*: the words or sign is presumed to conform to the internal intention to marry unless proven otherwise. When it is proven that no true matrimonial intention existed, the falsehood of the sign and the intrinsic nullity of that matrimonial contract are verified in the external forum, even though the intrinsic nullity always existed in the internal forum, only in this manner can the Church officially recognize the nullity in the external forum. That is the meaning, then, of c. 1101 § 2 in which the legislator defines the terms of the case in which one or both contracting parties lacks the true internal will to marry, as defined in c. 1057 § 2, a situation which, upon being proven, leaves without effect the presumption

established in a general way in c. 1057 § 1 and explicitly specified in c. 1101 of § 1.

Going back to the specific panorama of the facts regulated in c. 1101, we must emphasize that the common denominator of any simulating *fattispecie* is the willful lack of the essential conjugal truth in the *intentio contrahendi* by which the connatural congruency between the internal voluntary act and its perceptible manifestation disappears. This breakdown of the internal unity of valid consent brings about a disassociation of the internal free act of the will, the integrity of the spousal nature of human sexuality open to supernatural grace, and the cultural significance of the nuptial sign of efficient consent (freedom, nature, grace, and culture). This explains why canonical doctrine has described simulation as a deliberate contradiction between the internal will and the manifested will. In actual fact, however, there is no discrepancy of wills because there is no real duality of wills, one manifested and the other internal.

f) *Distinction between situations of fact and the essential structure of simulated consent*

The factual setting of simulated consent is a will devoid of truth of marriage in the nuptial sign. The actual facts that, ultimately, lead and end in the conjugal falsehood are very diverse. In the same way that the many possibilities of eliciting a valid consent do not depend on any one psychological, biographical, motivational and factual model, there is not one single model for generating a simulated consent. We note that the structure of valid consent, as defined by c. 1057 and ensuing canonical tradition, does not rest on any particular type of subjective psychological experience or on any antecedent motivation, on the part of a hypothetical individual, raised by the legislator to a model or archetype. Nor has the legislator or canonical tradition fallen into the trap of converting into a legal norm the psychological experience or the biographical *process* of the person consenting either validly or invalidly. Simulation, therefore, is not a psychological model but the deliberate absence, in the person's act of consent, of the properties or the objective ends of marriage.

Certain sectors of doctrine and jurisprudence seem to be inclined to raise the factual presuppositions and the psychological patterns to the rank of the elements that form the internal structure of simulation as a cause of nullity. By a seemingly overemphasis on those explanations of simulation, one runs the risk of creating an *a priori* scheme or even to the extent of dedicating exclusively to a frequent factual situation as a model and archetype of those normative requirements in which simulation, as a case of nullity, can be ascertained. It should not be denied that, in forensic practice—and not only in the field of teaching—, such models can induce "to simulate the simulation" by adjusting the sequence of the real acts of the singular psychological and biographical circumstances of each subject to the sequence of the doctrinal and jurisprudential models so as to obtain the "aspect" of simulation, and to this effect, the elements of the proof of

the model of simulation which this doctrinal and jurisprudential sector recognizes as a cause of nullity.

In short, the canonist should not confuse the normative structure of the causes of nullity contemplated in c. 1101 § 2 with a psychological, sociocultural model of "simulating" but must seek the certitude of the juridical assessment on simulation by exposing and proving the common denominator of simulated consent which is, always and everywhere, *the falsehood of the nuptial sign caused by the voluntary absence, total or partial, of the party's truthful intent of self-giving and accepting-the-other in an indissolubly faithful partnership of life and love ordered to the conjugal good and to the procreation and education of offspring.*

g) *The four essential elements of simulated consent*

In the first place, every simulating intention rests on its own willfulness, that is to say, on the person's voluntarily act, or an act originated by the will's own power and with sufficient knowledge of its ends. Simulation is a voluntary act, not determined by any motivation, not even by error, even though motivations can explain the act and give it an "appearance of truth," mainly in what refers to the proof. Simulation, in other words, rests on a free and conscious *actus positivus voluntatis.*

In the second place, a simulating intention implies a voluntary and objective falsification of the true conjugal contents of the nuptial sign as expression of the *animus vere maritalis*: simulation is the voluntary absence of the objective truth of marriage in the nuptial sign.

In the third place, the simulating will is a supplanting will that replaces the party's true will to marry. Willing, falsifying, and supplanting are the three characteristic features of simulated consent.

To those three features we should add a fourth one: the simulating intention must be *susceptible of proof* in the external forum in order to overcome the presumption in favor of the agreement between the external nuptial sign and the parties' internal consent. Under this perspective, the adjective "positivus" of the excluding act of the will means also an act of the will that can be proven, that is to say, the possibility of being recognized with moral certitude in the interpersonal or external juridical order (*see below*, no. 13).

3. *Willfulness*

a) *Reasons for placing the law on simulation (c. 1101) after consensual incapacity, ignorance, error, and knowledge or opinion of nullity (cc. 1095–1100)*

The systematic location that the legislator has chosen for the norm regulating simulated consent implies a first and important reason for the

interpretation of the canon. In the canons preceding c. 1101, invalidity *originates from outside the will*: a psychic incapacity of the person (c. 1095) or that type of ignorance or error of the intellect (cc. 1096–1099) that, moving into the will as its next logical stage, impedes or entirely vitiates the willfulness of consent. In c. 1101, the legislator regulates a whole series of causes of nullity which, properly speaking, *originate in the conscious and free will of the contracting party.* In cases of incapacity, ignorance, or error, the will of the person is not the original cause of the invalidity of the act because the will of the contracting party is *subject to* a psychic incapacity or labors under ignorance or error of the intellect.

It is crucial to understand that simulation is a defect of consent that originates in the person's own free and conscious will if we are to correctly understand that, in order to simulate, a "positive act of the will" is required, if we are to properly distinguish simulation from error, mainly when the latter acts as a motive for simulating (i.e., as *causa simulandi*) and not to confuse the motives for simulation (the *causae celebrandi vel contrahendi* and the *causae simulandi*) with the simulating will which, strictly speaking, is the positive act of excluding.

b) *The positive act of exclusion must be a voluntary act in the proper sense*

The positive act of the will prescribed in c. 1101 § 2 is an elementary legal requisite congruent with the positive act of the will that is required for a true consent (c. 1057 § 2) of which the simulating will is the film negative, in such a way that without the willfulness to simulate there is no simulation understood as *caput nullitatis*. To say it in practical terms, the aspirations, desires, motives, concerns, ends, or interests which the person may enjoy or endure are not acts of the will and are not, therefore, positive acts of simulation. Those states of mind can explain the person's inducement to simulate but they are not, in and by themselves, acts of the will and are not able to prove that the person has simulated. The same can be said of those personal dispositions that may appear as willful but are not so, properly speaking, such as moods and emotions which the person experiences as feelings, delight in the thought of pretending or simulating, yearnings, or other inducements which are not "willful," in the strict sense, because the person "labors under" them as a passive subject, that is to say, experiencing their inducement without, however, being so actively implicated, by himself or herself, in that stimulus as to have converted it in his or her "own act."

c) *Motivations and the positive act of the will: the role of the so-called* causae celebrandi vel contrahendi *and of the* causae simulandi

The relationship between motivation and the willful act of simulating should be interpreted in the light of c. 1057 and by differentiating, as in valid consent, the factors which, although desired (simply *volita*), induce the person to act from the willful act itself (the *voluntarium*).

In cases of simulation, the positive act of the will tends to be preceded and accompanied by certain subjective motives, interests, and ends. Although those subjective factors are not the positive act of excluding, they are indeed very important for the purpose of proof, for they describe a biographical scenario that makes it reasonable to assume the possibility of an excluding positive act of the will. Those motivations can *de facto* influence the person in two ways: in one direction, they can induce the person to seek the benefits and the effects of the nuptial celebration such as obtaining the spouse's citizenship, profiting from the other party's finances, procuring free domestic care and services, and so forth: these types of motive are commonly called *causa contrahendi* or, less equivocally, *causae celebrandi*. In the other direction, some particular motives, interests, or ends may induce the person to shun a true conjugal union as, for instance, aversion to the person or to the fact of marrying, fear of having children and of the responsibilities thereof, the continuing relationship with a lover, etc. Doctrine usually calls these *causae simulandi*.

A rigid and simplistic use of that classification, however, should be avoided both at the level of theory and of forensic practice. In the first place, the fact that those motivations run in opposite directions (inducing the marriage or inducing its falsification) does not imply two canonical categories of a different nature, or two types of motivations demanded by the legal norm and required in each particular case under pain of disqualifying the case from examination. It may be sufficient to point out in this regard that the on-going relationship with a lover, for instance, can also induce the person to want a true marriage and use the matrimonial state as a powerful personal incentive and an official excuse for ending the affair once and for all, or the acquiring of the same nationality status, for example, may facilitate the spouses' common conjugal life. The opposite may also occur when a person had no interior will to be truly united in marriage, that is, the same motivation can induce the marrying party to seek only the appearance of true nuptials for the purpose, for instance, of profiting from the spouse's fortune or enjoying the labor benefits of the new nationality. At any rate, the one and same motivation may act in opposite directions as in the case of a man's intention to feign the wedding with a seasoned woman servant for the purpose of ensuring her continuous domestic services (*causa celebrandi vel contrahendi*), which would also explain the man's lack of true internal will to take, consider, and honor her with the dignity of a spouse (*causa simulandi*), with no other type of motive, such as aversion towards the person, being required. In fact, in the hypothesis just mentioned such aversion may not exist but a certain affinity and sympathy may, rather, prevail between employer and domestic helper because of her many years of efficient service.

In summary, willfulness originates in the person; the motives for acting, whether one or several hundred, as well as the direction of their inducement depend on the non-recurrent uniqueness of each particular

situation; the person can decide, by means of his or her will, to act against the motivations and the inducements endured. In any real case, however, marriage consent, whether truthful or simulated, consists of one single act of the will intending one single object, which is either the willful self-giving and the acceptance of the other as man or woman in a life-long partnership ordered to the good of the spouses and to the procreation and education of offspring, or the willful non-giving of self and non-acceptance of the other in partnership, or in one that is non-exclusively faithful, or not for a life-time, or not as a self-giving duty bound to the conjugal good or to the procreation and education of offspring.

In this sense, it seems to be an artificial psychological pattern to demand from simulated consent, on the basis of the double motivation converted to a normative category, a double voluntary structure: a positive act of the will in which one wants the wedding, and another and distinct positive of the will which excludes marriage in itself, its properties or its ends. As a result of this psychological pattern, one would reach the paradox to demand from the structural category of the simulated consent two positive acts of the will to contract an invalid marriage, while c. 1057 only demands from the contracting party one positive act of the will to validly contract marriage. This defect of interpretation has for its primary source —although not the only one, as we shall see later—in giving the function of normative categories the double direction of the motivations (as soon as this double direction is converted into two requisites of the *caput nullitatis*) and in supposing that each motivational direction has to "culminate" in a proper and specific positive act of the will.

d) *Error as an autonomous ground of nullity and as a cause of simulation*

Error can invalidate marriage when it is a substantial error (see commentary on cc. 1096 and 1097) or when it is the determining error of c. 1099 (*see* commentary). Error can also be a *causa simulandi* when the person freely chooses, through his or her own will, the erroneous object, or the wrong idea of the properties or of the sacramentality of marriage, which the intellect presents to the will as the best and most attractive of several possible options. Even though the erroneous concept presents itself as a motive or enticement inducing the person to choose it, the error of the intellect does not determine the will because the will freely chooses it while rejecting the other known and possible options. This type of error is not in itself an autonomous cause of nullity because it does not deprive the person's will from self-determination, as in the case in c. 1099, even though the error may induce simulation as an influence or motivation (*causa simulandi*) that leads the person to freely choose that type of marriage deprived of unity, indissolubility, or ordination to the conjugal good or to the procreation and education of offspring, which the party does *want* to contract as his or her own marriage.

4. *The objective falsehood of the nuptial sign*

a) *Simulation implies a voluntary and objective falsification of the true conjugal content of the marriage ceremony*

Another way of defining simulation originates in the close connection existing between simulation and falsehood. A centuries-long canonical tradition, beginning with St. Thomas Aquinas and the classical moral writers, understood that one of the characteristic features of the act of simulating was the will to simulate a false external sign (*"voluntas falsum enunciandi"* or *"mendacium in exteriorum signis factorum"*). Canonists, then, designated that act with such expressive terms as simulation or fiction which underlined the simulator's intention to use the external manifestation of consent, or wedding ceremony, to feign a non-existent matrimonial intention (*"Simulatio proprie est mendacium quoddam in exteriorum signis factorum consistens"*).

Except for certain vacillations on the part of some earlier authors, the majority of canonists soon opted for not requiring a malicious intention (*dolus*) in the simulator. Canonical doctrine has peacefully held for a very long time the position that it is not necessary for the simulator, in addition to knowing and wanting the object to be excluded, to maliciously intend to deceive the other party, or a third party, in order to obtain consent or some other subjective benefit. As long as *the simulator knows the thing being excluded and wants it excluded* (regardless of whether the simulator's intention may be licit or illicit), the rendering of consent, or external sign, is *objectively* falsified; that is, the *essential conjugal truth conveyed by the sign is falsified* so that no malicious intention on the part of the subject is further required. Nor is it required that the person should know the juridical nature and effects of simulation as a cause of nullity.

b) *A corrective reworking of the description of simulation as a known and willed discrepancy between the internal will and the manifested will*

Due to the fact that the internal structure of efficient marriage consent consists of the joining of the spouses' two wills with the communicating sign, simulation has been often described as a known and willed conflict between the person's internal will and manifested will. The manifested will, however, is not a new "voluntarium" different from the party's internal will. Rather it is a pedagogical artifice, more than an actual fact, to hold that the efficient marriage consent is composed of two acts of the will, one whose object is the act of self-giving and the acceptance of the other, independent from the first, whose object is the wedding ceremony. The wedding is the manifestation, through words or equivalent signs, of the internal will (the *intentio contrahendi* or *animus maritalis*) but this internal will is, in each contracting party, the same and the only will that is

being manifested. The words or the signs do not constitute an additional act of the will, on the part of the parties, different from the first. Besides, if the so-called "manifested will" were to be a new and *proper* act of the will, it would have to be rooted in its own, but different, internal act of the will which for its manifestation would, then, require another artificially added act of the will which, in turn, would be generated within the person by another independent internal act followed by a senseless chain of acts of the will *ad infinitum*. Therefore, the false consent of simulation does not require two discordant wills on the part of the simulator, as the party's valid consent is not formed by *two* concordant but independent wills. In actual fact, simulation consists of the lack of the essential conjugal truthfulness in one or both parties' internal will; since this lack of truth is known and wanted by the contracting party, it inevitably falsifies the manifested external nuptial sign, thus breaking down the joining of the will with the manifesting sign which constitutes the unitary structure of the conjugal covenant or efficient consent.

5. *Supplantation and its excluding effect*

a) *Merely nuptial sign in itself is not an efficient cause of the bond of marriage*

Now we must emphasize one of the meanings of the presumption of c. 1101 § 1 and expand it. This is a presumption *iuris tantum*, for it admits contrary proof not only because the person can falsify the sign but also because the external sign or marriage ceremony, considered in itself and independently from any willful falsification, lacks efficient power. In other words, since the conformity between the nuptial sign and the party's will is, without any doubt, a presumption *iuris tantum*, what counts with regard to the efficacy of the sign is not the mere sign as such but the party's internal will contained in the sign and manifested by it.

Therefore, the contracting party whose will has only for its object the wedding ceremony (the so-called formal will, *intentio ore tantum seu verbis* or *intentio celebrandi*) does not contract a true marriage according to the Law of the Church. The *intentio celebrandi* alone is inefficient because it is not that act of the will defined by c. 1057 § 2. It is not correct to say that a marriage is valid *even if no internal will to contract marriage may exist*, as long as the contracting party has not elicited a positive act of the will excluding the juridical efficacy of the marriage ceremony. Such interpretation concerning the object of the positive act of excluding described in c. 1101 § 2, is not in harmony with the object of the act of the will defined in c. 1057 § 2. Requiring that simulation should include a positive exclusion of the efficacy of the external sign would amount to enshrining, *a contrario sensu*, a supposed positive act of the will over the nuptial form as the efficient cause of the conjugal bond, and

holding that the juridical efficacy of the nuptial sign ought to be a positive object of the act of consent is contrary to the entire canonical tradition as received in c. 1057 § 2. This is also the reason why the exclusion of the efficacy of the nuptial sign in the external forum is not included within the grounds of nullity of c. 1101 § 2. Furthermore, the willful concealment of this efficacy is a condition for the possible existence of a secret marriage or marriage of conscience (cf. cc. 1130–1133).

At the start of this commentary we explained with certain emphasis that c. 1101 is the *photographic negative* of c. 1057 and that the exegesis of that first canon must be done under the light of the latter canon. In what refers to the true efficacy of the nuptial sign, therefore, c. 1057 reflects the fact that such efficacy rests on the one single will of each contracting party, which is none other than the positive and internal act of the will whose nature and content is defined by c. 1057 § 2 and which canonical tradition has indistinctly called *animus maritalis* or *intentio contrahendi*. In addition, when this will or intention must be mutually communicated between the spouses and be recognized by the Church, it must be first embodied into words or equivalent signs in order to be unequivocally manifested between the spouses. In the second place, it must be recognized by the qualified witness and the two other common witnesses. Notice, however, that *it is the same and only marrying act of the will* that is manifested in the nuptial sign and is received by the Church. It is in this sense, then, that we say that there is one single act of will in valid consent.

b) *The simulated will is a supplanting will that replaces the true intention to be married by means of the nuptial sign*

Simulated consent consists essentially of a conscious and willful supplantation of the one will to marry by another internal will deprived of the integral and essential truth regarding marriage. In the same way that valid consent implies only one positive act of the will (the *intentio contrahendi* or *animus maritalis*), simulated consent, which is the photographic negative of valid consent, necessarily implies a *unity of the voluntary act* of simulating or *intentio simulandi*. In so far as the latter is a voluntary act, and positive in its content, it supplants the single and true act of the will and, by so doing, it *necessarily excludes the true act of the will as well as its content.*

c) *Exclusion as a necessary effect of the supplanting will*

While *supplanting* or taking the place of the true will to marry is the very essence of simulated consent, the *exclusion* of marriage's true content is the dynamic consequence or automatic effect of supplanting. The essential structure of marriage, which is the object positively wanted by the true conjugal will, is replaced by the object intended by the simulator's will whose content is not the bond, its properties, or its ends. Between the will of the simulator and the act of exclusion there is a cause and effect re-

lation: by supplanting the authentic will and its intended content, it follows as an automatic effect that the bond itself, its properties or its ends (i.e., the content of the truthful will) are excluded without any further excluding act of the will being needed.

It is obvious that a cause is different from its effect, and so one thing is the cause by which the contracting party's act of the will intends an object whose inner structure is different from marriage, which is then falsified under the manifestation of consent, and another thing is the excluding effect that follows from the same and one voluntary episode. It is true that the cause necessarily produces the effect (*the positive voluntary act excludes*) and the effect needs the cause (*the exclusion requires a positive act of the will*), as required by c. 1101 § 2, but cause and effect are different.

Perhaps that differentiation between cause (the simulating will) and effect (the exclusion) can help to find the solution to the question debated by a contemporary sector of doctrine and jurisprudence against the judgment of centuries-old canonical tradition. It is not accurate to interpret the text of c. 1102 § 2 in the sense that the positive act of the will has to have always as its *direct intentional object* the act of exclusion. It is more precise to describe exclusion as the *necessary effect directly or indirectly caused by the intended object of the simulating will.* For example, in the case of a simulator positively and consciously desiring *only* the nuptial sign, the contracting party's single will contains, not the object of the true will (as defined by c. 1057 § 2), but the supplanting object as the only one positively desired, thus causing the conjugal bond to be excluded by that supplantation.

Another example may refer to a simulator who positively and consciously desires a definitive union characterized, however, by the freedom to enter into sexual relations with other persons throughout life. As experience shows, that intention may not be externally manifested and, for that reason, the contracting party will pronounce in the wedding the same words that are used for any valid marriage. The party's only internal will, however, is the one just described which, taking the place of the truthful will to marry, consists of a positive supplantation that automatically causes the exclusion of the unity of the bond (i.e., its exclusive fidelity). For this exclusion of fidelity to occur, the party need not elicit another act of the will positively excluding fidelity in addition to the act of the will wanting a union as described above.

The canon does state that a positive act of the will must exist because simulation is a conscious and voluntary lack of a true will to marry which is presumed to exist by the nuptial sign. The canon states that the content of this positive act of the will must cause an excluding effect of marriage itself, its ends, or its properties because, ultimately, the nullity of the act fundamentally depends on that necessary and indispensable effect.

However, such effect can be provoked by the intended object of the simulating will either *directly* or *indirectly.*

It is very important to note that the text of c. 1101 § 2 makes no distinction concerning the *nature* of the positive act of the will *which is the cause* for one or both contracting parties to provoke the *excluding effect,* or simply exclude it. The distinctions made by the legislator refer to the excluded objects, i.e., marriage itself, an essential element, or an essential property. *In regulating the positive act of the will that causes the excluding effect, the legislator uses a unitary notion for total or partial simulation,* and canonical doctrine and jurisprudence cannot ignore this fact by making distinctions which the legislator does not make and neither could they elaborate a double explanation of the simulating act itself.

6. *The exclusion of* "matrimonium ipsum"

In c. 1101 § 2, the legislator has established that if one or both contracting parties positively and voluntarily exclude marriage itself ("matrimonium ipsum") at the moment of manifesting consent (the marriage ceremony), they contract invalidly. Canonical doctrine usually designates this cause of nullity as "total simulation"; the adjective "total" indicates, not so much a *total quantity* of matrimonial truthfulness, or a sum total of the elements that form the essential structure of marriage, as the substantially complete principle that constitutes the juridical bond, in which and by which the spouses become one in conjugal matters.

a) *Significance of the expression* "matrimonium ipsum"*: the bond*

The expression "matrimonium ipsum" (marriage itself) is used by the legislator to refer, strictly speaking, to the conjugal bond which is the very substance of marriage and the object of consent.

The bond comes into existence when the contracting parties, by means of their matrimonial consent, give and accept each other not symbolically or metaphorically but in a real sense. To belong to the other (while before consent, each of the contracting belonged to himself or herself exclusively) constitutes a new way of being, that is, to be united.

Above all, we should not think of the marriage bond as a third entity external to each of the two contracting persons, or as a "bridge," as it were, between the spouses, or as a legal obligation imposed from outside by the power of the public authority. This bond is, rather, the unifying principle of the spouses' own personhoods and individual lives, which is brought into existence by the spouses' own consent (cf. c. 1057). The conjugal bond is, properly speaking, the man and the woman *in as far as they are united*—it is that which binds their union. In that sense, the bond is the "*quidditas*" *of marriage* because it is the uniting principle, within the conjugal union, by which the spouses are *one* in their being and lives.

b) *The substance (*"quidditas"*) of the conjugal bond is of a juridical nature*

The marriage bond, or unifying principle of marriage, is an entity of a juridical nature. When two persons are united in marriage, their own personal natures of man and woman cannot become a communion that is equal to a fusion involving the loss of their subjective individuality, as a river flowing and into the sea. Two persons, however, can enter into a communion by sharing something in common. The man/woman communication in the order of their sexual dimension is more profound than in other fields of human sociability. The complementary diversity of human sexuality contains a potential for unity that runs along two intimate and exclusive dimensions: on the one hand, a sexually diverse person can be incorporated into that intimate aspect of one's existence, in which one is owner of his or her own sexual modality, in such a way that the two persons' sexual complementariness becomes a state of mutual belonging—of giving oneself to the other and of accepting the other as if being oneself. On the other hand, from that common and intimate common sharing derives, as from its source, the human procreation of another human being: held by their conjugal unity, the spouses share in the procreation and the education of the new human being. This potential for intimate communion between persons by reason of the complementariness of human sexuality makes it possible for the spouses to establish their intimate companionship as well as the procreation and education of offspring as a *common mode of being and of living due in justice.* By an exercise of their sovereignty over themselves (the contracting parties' internal will), the spouses establish a communion, *due to each other in justice,* in the mode of being and of living, which is potentially contained in their sexual complementariness. That binding principle by which the spouses are commonly identified as being for each other and living as co-owners of each other, as a mutual right and duty, is a *juridical bond or bond of justice.* In that sense, then, the conjugal bond is the most essential and basic common good that the spouses share as spouses and, strictly speaking, the substantial good that constitutes their conjugal identity.

c) *Conjugal bond and sexual relationships* de facto

The juridical nature of the conjugal bond, or *bond of mutual co-ownership in justice,* is the formal principle that allows us to differentiate the substance of marriage from a *de facto* common life between a man and a woman. The difference between those two situations does not depend on the two persons' greater or lesser use of their marital life but on the principle that informs their sexual relationship. The spouses' mutual co-ownership, due in justice as a mutual right and duty, is the key element of this distinction. It consists of the man's and the woman's mutual self-giving and other-accepting which, by means of their matrimonial consent, makes the husband to be owner, in justice, of his wife's femininity in the same way that he owned his own masculinity before the wedding, and

which makes the wife to be owner of her husband's masculinity as she owned before consent her own femininity. Without this juridically binding principle, the rest of the "marital" elements which could exist in practice between a man and a woman are mere *de facto* elements in which an identity due in justice is not founded and, consequently, there does not exist the duty to realize them as a community due in justice. The *de facto* situation of living together is not, by definition, a common life that *ought to exist* but something that just happens to be. Marriage implies a union between persons which is due, that is to say, a union that must be existentially carried out, as a project that is due, in fulfillment of the persons' duty to be spouses. The *binding in justice* is the formal principle that confers true conjugal entity to all the elements that form the structure of marriage: the consortium or common biographical destiny, the common life, as well as the properties, the ends, and the sacramentality.

The juridical bond, which can be established only on the truth of the conjugal giving and accepting, is missing when one or both contracting parties, freely pronouncing the nuptial vows, continue to be exclusive owners of their own respective manhood and womanhood, thus voluntarily retaining each one's particular sovereignty over oneself and the future of one's life, and not giving and accepting each other in a co-ownership of each other which is due in justice. Their common life, its contents, and its projection in time are, in this case, mere occurrences that depend on each person's convenience and satisfaction but not as common rights and duties. In such situation, the *bond or marriage itself is lacking* or, to say it differently, there is *total simulation.*

7. *Various ways of excluding marriage itself*

The juridically binding principle between the spouses (the bond which is due in justice) can be voluntarily excluded in different ways. These, however, are not different classes of total simulation but different factual ways of excluding the same thing, namely, marriage itself or the conjugal bond. Each case should be assessed by identifying those facts which, sorted out from all the circumstances of the case, can lead to moral certainty, if proved, concerning the allegation that one or both parties, under the guise of the nuptial words or sign, *intended something that necessarily excluded the conjugal bond as due in justice.*

a) *Exclusion of the internal will to marry. Its distinction from playful and artistic representations of the nuptial words or sign*

Total simulation exists when a contracting party intends something that implies the *exclusion of the intention to marry,* which is the cause that establishes the bond. That would happen, for instance, in those situations in which the internal will of the contracting party intends only to go through with the wedding ceremony *ore tantum seu verbis* and to express

only the nuptial words which the party knows and wills to be false and void (*see above*, no. 2, e).

What is the difference between that modality of total simulation and the dramatic or artistic representation of a wedding ceremony in a theatrical, film, or television performance or of one done in jest (*iocus*)? In the artistic or playful representations of a wedding, the ceremony is indeed false and feigned but *everyone knows that the actors' intention is only to imitate reality,* even as best as possible, while in cases of total simulation, the party wants that all persons, and the juridical order itself, to accept as truthful and efficacious a wedding ceremony which the simulator knows to be false and wants it so.

b) *Explicit exclusion of the bond in the* consortium

Another way of excluding marriage itself is in those cases in which the will of one of the parties is to exclude marriage *in facto esse*. In these cases the object excluded is the *consortium or conjugal community understood as a personal mode of being and a state of life due in justice.* A contracting party may intend the intimate community and common life for as long as it is convenient and beneficial but not as the establishment of the commitment to a partnership of the whole of life due in justice (*see above*, no. 6, c).

It is not rare, but rather frequent, that the lack of matrimonial intent is revealed in the life-style of the spouse who continues to behave as a single person and who reserves to himself or herself, as not included in the partnership, certain areas related to fidelity, to the duration of common life, or to parenthood. In assessing the deficient elements of the particular case, the canonist must find out whether or not those deficiencies related to the essential elements of marriage (such as infidelity, denial of sexual acts ordered to procreation, dissolution, a free life-style, denial of common life, etc.) can be sufficiently explained as partial defects implying a partial simulation or as symptoms of having excluded the substantial informing principle or the bond itself, the absence of which will logically be revealed by certain anomalies in the conjugal partnership, its properties, or its ends.

c) *Exclusion of conjugal equality*

Now we must examine *the conscious and voluntary exclusion of conjugal equality.* The exclusion of the bond can be manifested by certain patterns of common conjugal life which, intended *from their root or origin*, form an unequal and discriminatory status for one spouse in relation to the other and within the totality of conjugal rights and duties. In actual practice, the person most often discriminated is the wife, insofar as and because she is a woman. The radical inequality of one of the spouses in the partnership of life carries with it the nullity of that marriage when that inequality is an element that defines the intended union. This is so because the juridically binding principle implies equality in the mutual

co-ownership and co-possession of the spouses, that is to say, the spouses are equally bound in relation to each other and in relation with the contents of the bond. This originates a strict equality of conjugal rights and duties between the spouses, and an equal status and dignity, due in justice, within the matrimonial partnership: in what refers to their condition of spouses, the spouses are equal. The exclusion *from its roots* of this equality would amount to establishing a bond of dominion or supremacy of one spouse over the other as well as a principle of unequal participation in the conjugal essence, properties, and ends which is essentially contrary to the juridically egalitarian nature of the true conjugal bond. Turning marriage into a relationship of domination, due in justice, would amount to affirming that such aberrations as supremacy, domination, and forceful appropriation are required by natural law and that they describe the true spousal meaning of the human sexual condition.

The canonist has to distinguish between certain abuses that derive, perhaps, from a person's faulty education or from social customs and cultural environment and that other principles of action, added to the abuse, by which a person may *consciously and voluntarily establish an unequal and discriminatory juridical bond in the structure of the marital partnership*. Only in the latter case is the marriage null due to the exclusion of the true conjugal bond. It is indeed a matter of experience that when a person radically seeks an unequal bond, the manifestations of the person's attitudes of supremacy, domination, and appropriation over the other, even if expressed by a great variety of actual deeds stemming from the social/cultural context, tend to form an historical pattern of the marriage in question. A radical defect in the essential structure of marriage is always manifested, if the defect is structural in nature, in the time preceding, at the time of, and following the wedding. Regardless of its particular manifestations, that radical defect forms *a biographical pattern* which is the thing that must be proven in order to attain certitude that the defect is radical in nature.

d) *Exclusion of the person of the other contracting party*

Rejecting the person of the other contracting party is another way of excluding marriage itself, for it is obvious that no bond can originate if one party of the bond is excluded. However, since "excluding the person of the other contracting party" is an ambiguous expression, we must first clarify the specific aspect that is excluded. The other party is excluded by rejecting this *particular individual*; or by rejecting, more specifically, *the personal condition* of the individual and the demands that the condition makes on the marriage bond which is an interpersonal bond; or the person can be excluded more directly and expressly by rejecting his or her marital dimension as man or as woman.

Total simulation exists, without any doubt, when one contracting party rejects the other because this particular *individual*, and precisely this one and not someone else, is not desired as a spouse.

Excluding the person of the other spouse may refer to *rejecting the persons themselves*, in the sense of excluding either the giving of oneself to the other or the accepting of the other. Thus, marriage itself is excluded when, under the guise of marriage and by orchestrating the nuptial sign, the only thing intended by the party is the appropriation of a sexual body as an object of sexual pleasure. In such case, the bond is excluded by rejecting the other party as a person or, to say it differently, by rejecting the personal dimension of the other party that forms the bond. For the object of marital consent is the union between persons, which is sustained by the communication of each person's sexual complementariness. The coming together of the two persons' bodies embraces their union, indeed in that communion of their bodies the persons are considered as one. In that sense we can say that the bond of justice by which the spouses belong sexually to each other, or the principle that shapes the conjugal union, is a spiritual reality which, emanating from an act of personal investment (the gift and acceptance of self as man and as woman), constitutes the personal dimension that sustains the spouses' sexual intimacy for life. Without that personal investment that personalizes the sexual union, the bodily communication would amount to using the spouse as a mere object. Canonical tradition from early times has correctly held that marriage is an interpersonal union (*unio animarum*) containing a sexual union (*unum corpus, unitas carnis vel corporum, coniunctio in una carne, una corporum mixtio*). Consequently, if under the nuptial sign, the exclusive intention of the person contracting is to fornicate thus rejecting any personal investment through the giving and acceptance of self by means of his or her sexuality, then consent is null by having excluded the juridical conjugal bond.

The reason for that invalidity of consent is that the conjugal bond cannot be reduced to a binding of the bodies only without implicating the party's personhood. The conjugal bond, rather, is the nexus that unites the persons of the spouses and, given its nature of being a personal bond, it originates only as a personal bond when marital consent includes *a voluntary investment of the persons of the contracting parties in their mutual giving and accepting of their sexual bodies*. The party's interior will in this consent is an act of the person and the object of this act conforms to the integral truth of marital consent, which consists of the giving and accepting of each other as man and woman, that is, as personal subjects of their own respective masculinity and femininity.

Finally, the person of the contracting party can be excluded expressly and directly when his or her conjugal sexual condition is excluded. This occurs in those cases when, under the guise of marriage, one or both parties only intends a union that is incompatible with or completely different from the conjugal nature of marriage thus causing, by the union that they intend, the unavoidable exclusion of such a conjugal nature. For instance, when the parties intend only a platonic relationship

in their relationship or a professional or financial partnership, or when for merely social or civil effects, they only admit the appearances of a marriage, and so forth. The crucial point in these cases is the party's exclusion of the giving and acceptance of masculinity and femininity as personal dimensions whose complementary union binds the couple in marriage. In other words, the conjugal bond is excluded by rejecting its sexual nature (*exclusio in una carne coniunctionis*).

8. *The exclusion of one of the essential elements of marriage*

a) *The new formulation of c. 1101 § 2 and the modification of the derogated text of c. 1086 § 2* (CIC/*1917*).

Between § 2 of c. 1101 and the derogated c. 1086 § 2 (*CIC*/1917) there is not a textual difference in what refers to the nullity deriving from the exclusion of marriage itself or of one of its essential properties (unity or indissolubility). The important innovation of the present canon consists of the suppression of the formula, "omne ius ad coniugalem actum" of the former c. 1086 which referred to the nullity deriving from the exclusion of the good of offspring (*bonum prolis*). That formulation is replaced in the present c. 1101 with the new formula "matrimonii essentiale aliquod elementum." The scope of the latter text can be learned from comparing the other formulas that were submitted to the preparatory commission before the present one was finally promulgated. In the first *schema* a reference was made, in addition to the exclusion of the essential properties, to two distinct forms of exclusion: the exclusion of the "ius ad vitae communionem" and the exclusion of the "ius ad coniugalem actum." The second *schema* kept the exclusion of the "ius ad coniugalem actum" but changed the other by introducing the formula "ius ad ea quae vitae communionem essentialiter constituunt." The preparatory commission clarified that the "ius ad vitae communionem" was an essential element of the object of consent and that its exclusion would, therefore, invalidate marriage. The commission added that the meaning of the "vitae communio" should not be confused with the common sharing of board, bed and dwelling, for the communion of life comprises the essential interpersonal relationship between the spouses. Therefore, its corresponding "ius ad vitae communionem" includes, by reason of its essential nature, a number of rights and obligations that are different from those usually listed by traditional doctrine.

The latter indication seems to suggest to canonical doctrine that the composition of the so-called "ius ad vitae communionem" is not equal to the rights deriving from the three goods of marriage (offspring, unity, and indissolubility) but is equivocal to, instead, the rights referring to the interpersonal dimension of the conjugal bond. Collating the text promulgated with the formulations that preceded it in the revision process, it would seem that the "ius ad coniugalem actum" and the "ius ad vitae

communionem" would be included, by reason of their common feature of being essential elements, within the comprehensive formula of "matrimonii essentiale aliquod elementum."

b) *Replacing the Augustinian system with the Thomistic exegetical criterion*

From the viewpoint of its textual arrangement, c. 1101 § 2 is not equivocal to the Augustinian system of the three goods of marriage (offspring, unity, and indissolubility) traditionally employed by canonical doctrine and jurisprudence to determine the object excluded in the so-called partial simulation. The present text of the canon permits the use of the traditional Augustinian categories only in reference to the properties and to the good of offspring (provided, however, that the "ius ad coniugalem actum" is surely understood as included within the formula "matrimonii essentiale aliquod elementum"), but those categories do not comprise the conjugal rights deriving from the interpersonal nature of marriage that is implied in the current formulation.

Consequently, the systematic criterion that is most reliable is, in our opinion, the one derived from the Thomistic conception of the essential structure of marriage: the cause, the essence, the properties, and the ends. Indeed this criterion fits better the internal arrangement of c. 1101 § 2 and the words of its text: the cause (consent or marriage *in fieri*) and the essence (the juridical bond of the conjugal union or marriage *in facto esse*) corresponds exactly to the contents of the exclusion of marriage itself. The properties of the bond are mentioned *expressis verbis* in the text of the canon. The rest of the essential structure of marriage (the ends) are included in the new formulation as the essential elements, or to say it with more exact terms, the object excluded, which the new expression identifies as "matrimonii essentiale aliquod elementum," is the ordering of the essence of marriage to the ends (*matrimonii ordinatio ad fines*) insofar as the ends are demanded in justice. The ends to which the conjugal consortium is ordered by its own nature are, according to c. 1055 § 1, the good of the spouses and the procreation and education of offspring. Consequently, the contents of the exclusion that the legislator considers in the expression "matrimonii essentiale aliquod elementum" consists of *those acts and forms of behavior between the spouses, juridically due in character, that are apt and necessary by themselves to attain the proper ends of marriage.*

c) *The exclusion of the ordering of marriage to its ends*

In what refers to the technical assessment of the exclusion of the ends of marriage, the canonist must remember that the notion of end is not univocal but has, in what concerns us, at least two meanings: the terminus of the action or result effectively attained, and the aim or purpose, a quality by which a thing is fittingly ordered, from within itself, towards its proper objectives. In the object of valid consent, the ends of marriage are assumed by the contracting party under the meaning of *aim or*

purpose, that is to say, as the dynamic tendency of the conjugal union towards its proper objectives. In contrast, the terminus or result effectively attained is not part of the object of valid consent. In that sense, then, the aim of marriage is but the essence of the conjugal consortium understood dynamically, that is, *marriage in action.*

Under the light of those considerations, the key factor in a person's intention to simulate by excluding the ends of marriage is something quite specific, namely the person's *disclaimer that those acts and forms of conjugal behavior which actualize the aim of marriage are juridical rights and duties existing between the spouses.* This repudiation can be done in two ways: first, by disclaiming that the ends connatural to the conjugal union are due in justice in the particular marriage to be contracted; and secondly, by disclaiming that the acts and forms of behavior apt and necessary to attain the ends are the object of a right/duty of a juridical nature. In both cases, the simulator refuses to owe in justice the ordering of conjugal life, whether in total or only partially, to the ends that are connatural to marriage. By reason of such refusal, therefore, the invalidating exclusion exists only when the right is radically excluded, but not when there is only a mere abuse in the exercise of the right. From this derives the classic distinction between the intention to exclude the right itself (*exclusio iuris*) and the intention to only abuse the same right (*exclusio usus iuris*), an important distinction for the application of this type of simulation, as we shall see.

d) *The concept of* "ordinatio ad fines" *in terms of the essential conjugal rights and duties*

The matrimonial bond informs the right conjugal order of the existential dynamism between the spouses by conferring to the conjugal union a direction towards its connatural ends with a *dynamism due in justice.* The ordering of matrimonial life towards its institutional ends and the acts and forms of conduct that embody and express that ordering are *essential elements of marriage.* They are essential and specific representations of the informing presence of the conjugal bond, insofar as the juridical bond runs along the line marked by the ends of marriage. Being of a juridical nature, those conjugal elements are demands of justice between the spouses and can be appropriately defined in terms of *mutual rights and duties.* Since these rights and duties originate in the conjugal bond, which is the essential *quidditas* of marriage, they are *essential* conjugal rights and duties, and since the conjugal bond is of a juridical nature, they are also rights and duties of a *juridical nature.* The contents of those rights and duties is not formed by the ends understood as results (e.g., the children born and the common conjugal home), but by the acts which, as means that are apt and necessary to attain the ends of marriage, express the purpose of the bond. In this sense, those rights and duties describe the conjugal way of implementing the ends of marriage at its most basic and essential level.

With the new legal formulation, the legislator intends to refer, as mentioned above, to the ends of marriage, or to its *ordinatio ad fines*, which the discipline on simulated consent cannot overlook. Even though the term "end" is equivocal, the formulation of the *ordinatio ad fines* in terms of essential rights and duties permits a more precise and practical juridical definition of the nature and contents of the different forms of exclusions.

9. *The exclusion of the conjugal rights and duties derived from the ends of marriage*

Now we shall examine the specific rights and duties derived from the ordering of marriage to its ends. Not all the essential rights and duties are comprised in this category (*see* commentary on c. 1095) but only those that derive their essential attribute from their *ordinatio ad fines*. The actual contents of these rights and duties derive mainly, though not exclusively, from the ends, namely the good of the spouses and procreation and education of offspring. We say mainly but not exclusively because those two ends are intimately and inseparably connected so that the dynamic of conjugal life aimed at the ends cannot attain the end of procreation and education of children in a matrimonial order if life is lived, in actual practice, against the demands of justice (the rights and duties) of the good of the spouses. Conversely, there cannot be a true ordering to the conjugal good if conjugal life itself is exercised against the demands of justice concerning the procreation and education of offspring. It should be added that a mere contract of procreation separated from the conjugal good of the spouses is not a true marriage, nor is a mere relationship between the couple disconnected from the connatural dimensions of fatherhood and motherhood implied in being a man and a woman whose total giving and accepting of each other is, precisely, the object of a true matrimonial consent. In the contents of each specific conjugal right and duty both ends are conjointly present in a substantially inseparable way. The conjugal good offers the *matrimonial mode* of directing the spouses to procreation and education of the children, and this latter end offers to them an *opening* beyond conjugal intimacy and towards objective fruitfulness (i.e., the children) as their common contribution to society and the human race. The conjugal good confers to human procreation a personalized origin and the ambit of a personalized life to all the family members, for the intimate communion of the spouses is the core that supports and radiates family intimacy to others. The ordering of procreation and education of children confers on the conjugal community an opening to real and objective human fruitfulness—the children. Consequently, *binding oneself in justice to those acts of life ordered in an inseparable manner to that double finality* is the common denominator of the conjugal rights and duties derived from marriage's *ordinatio ad fines*.

a) *The right/duty to the conjugal acts*

The contents of this right/duty is the intimate conjugal act understood as the intimate sexual union of the spouses' bodies (the coitus), performed in a human manner, and by itself naturally apt for the generation of children (cf. c. 1061 § 1). The exclusion that invalidates marriage consists of the conscious and voluntary repudiation, by one or both contracting parties, that the conjugal acts performed in a complete manner for the purpose of procreating *constitute a conjugal right and duty to be demanded in justice.* The expression *humano modo* with reference to the coitus means that, among other qualities, this act must be a "human act" endowed with sufficient knowledge and full willfulness. Needless to say that physical violence and moral coercion, for example, would hinder the willfulness of the act (cf. c. 1061 § 1) and that a contractual will to reserve to oneself the right to obtain that act through violence, or deprived of willfulness, would imply the invalidity of such consent.

This point just stated is the key to a correct understanding of the presumed facts. For example, morally disordered acts of sexual intimacy which deprive the sexual act of its quality as a human act, or of its connatural orientation to procreation, are not in themselves causes of nullity of marriage, unless the decisive fact in this entire matter is demonstrated, namely that at the time of establishing marriage, the intention of the person was to exclude the clothing of the right, able to be demanded in justice, with the conjugal act itself or with its performance in a human manner and naturally apt for procreation. Presupposing that the conjugal act or its moral and correct practice had been denied, the examination of the facts antecedent, concomitant, and subsequent to the wedding must also show whether such behavior was due to abuse, the person's moral limitations, weakness, contradictions, vices, or selfishness originating in and interacting in marriage *in facto esse* or whether it was more radically caused by a supplanting will antecedent to, or at least concomitant with, the moment of contracting marriage.

b) *The right/duty not to impede the procreation of offspring*

The mutual giving and accepting of the man and of the woman in their respective masculinity or femininity comprises the mutual giving and accepting of their potential fatherhood and motherhood, from which originates the right/duty of not doing anything that can effectively hinder the procreation of children (*ius/debitum non faciendi aliquid contra prolem*). The exclusion of this right/duty can take two forms: *a)* the retention by one or both parties of the exclusive faculty to use, as a subjective right, means apt by themselves to hinder the normal procreative process as, for example, sterilization, contraception, abortion; *b)* the repudiation, by one of both contracting parties, of being mutually bound in justice to correct by licit methods those defective organic conditions or diseases which, being ordinarily curable, make the normal accomplishment of the coitus or of the procreative process difficult or impede it (e.g., a rigid or

imperforate hymen, fungal vaginitis, trycomonal or bacterial phimosis, and many other forms of sterility), but which do not constitute the impediment of impotence (cf. c. 1084) or psychic incapacity (cf. c. 1095).

Since the child, as such, is not the object of a right to which the parents are entitled, marriage is not a mere contract of procreation, and the ends of marriage cannot be pursued as if disconnected from one another or in mutual discrepancy. It follows that the natural conjugal act, which is the conjugal manner for the spouses to order themselves towards procreation, is consubstantial with the right/duty not to hinder procreation. Likewise, many of the techniques of assisted procreation violate the human mode of conjugal union or the natural way of procreating. With due regard for the autonomy of the moral assessment of those techniques, and centering our argument on their juridical effects, an invalidating exclusion of the *ius debitum* to the conjugal act exists only when it is proven that the will of one or both parties to use those alternative procedures of assisted reproduction did supplant the giving and accepting of the right/duty to the conjugal act. In other words, an invalidating exclusion exists when there is evidence that the will to use the techniques of assisted reproduction in any of its phases (from the selection of gametes to birth and by means of different techniques and alternatives to fertilization and gestation) was *the method of procreation exclusively wanted by the spouses for their conjugal union*, and that such willfulness anteceded the moment of contracting marriage, was not revoked, and prevailed, as a *substitute*, over the intention, due in justice, to the natural coitus performed in a human manner and ordered to procreation. On the contrary, if the spouses established, at the time of contracting, the right and the duty to the conjugal act, as *due* by force of their union and as the method of procreation *due* between themselves, then those forms of behavior and those acts of assisted procreation subsequently practiced through the course of their marriage *in facto esse* are irrelevant in regard to marriage nullity. This is so because, apart from their being morally illicit, even in the most serious and extreme cases of heterologous artificial fertilization, those actions are abuses in the practice of the right/duty to the conjugal act rightly established at the moment of contracting.

c) *The right/duty to establish, protect, and develop the intimate community of human life and love, which expresses and actualizes the conjugal bond*

The conjugal bond is the uniting principle by which a man and a woman become *una caro*. It produces the specific manner of living and loving that is expressed in the spouses' intimate community of life and its proper common destiny. Those actions, forms of behavior, and personal services aimed at establishing, preserving, and developing that intimate life-sharing consortium, or unity of destiny in the spouses' communion of human life and love constitute a mutual right and duty which, emanating from the bond that unites the spouses, it expresses, at the same time, the

bond's dynamic character. This right/duty is more predominantly informed by the end of the conjugal good: while the object of the right/duty to conjugal acts contributes to the personal union of the spouses with the type of communion proper to their sexual corporal nature, the object of the right/duty to the community of life contributes to the corporal sexual union of the spouses with the communion proper of the spouses' personal nature.

By marriage, certain aspects of each party's intimate personal life become common to both spouses: the man's and the woman's personal subjectivity is no longer "exclusive" to each party but is shared between them. Their personal communion becomes possible by each spouse becoming one with the life of the other spouse, as if it were his or her own life, and by their sharing in common each one's life circumstances. The reciprocal solidarity of the spouses' personal lives and their mutual sharing of those circumstances form a unity of lives which, saying it with more conventional terms, means that they establish a life in common, a unity of destinies, or a consortium of the whole of life. Consequently, those *personal acts of solidarity and coparticipation, necessary for the instauration, conservation and development of the common conjugal biography and susceptible to juridical formalization (to be demanded as something just and due), constitute the object of the so-called righ/duty to an intimate community of life.*

The contents of this right/duty comprises, in the first place, the physical life in common apt and necessary for the real and effective ordering of the conjugal union toward its proper ends; the same right/duty also includes the providing for the necessities of life (food, clothing, health, house, rest, and other personal necessities of the other spouse connected, within realistic possibilities, to the *ordinatio ad fines*). The latter also implies the commitment to carry out those acts and services that are appropriate to obtain those necessities and to share and enjoy in common the goods destined to satisfy the needs of the dynamics of conjugal life. The same right/duty also includes the upholding of the *conjugal dignity* of the spousal community of life both *ad intra* (the spouses' inward personal exchange) and *ad extra* (the spouses outward projection of their matrimonial life either by one or by both spouses together). The right/duty also contains the sharing of matrimonial decisions, which is a very specific expression of the equality of the bond, which binds the spouses equally to each other and by which their union is equally ordered toward the matrimonial ends. The radical refusal to be bound in justice by the demands proper of the intimate community of life, or the conscious and willful intent, existing from the moment of contracting, of not rendering those services in justice but merely as a private faculty, implies a positive exclusion of the good of the spouses. As is always the case in reference to the proof, the person's antecedent, concomitant and subsequent behavior forming a consistent way of living supports the presumption that the right

itself was excluded and that such behavior was not merely a deplorable pattern of abuse in the personal relationship in the spouses' common life.

The interpreter of the canonical norm, which applies universally to contracting parties of very diverse levels of culture and development, should not overlook either the essential core of this right/duty to the intimate community of life nor the historical changes in the cultural and social expressions of the contents of this right. In what refers to the essential core, the intimate community of life is an indispensable element of valid matrimonial consent by which *each contracting party gives himself or herself to the other as spouse and is accepted as the receiving party loves himself or herself.* By this receiving of the other, the solidarity of the spouses' personal lives and the sharing of their personal circumstances become *the common good (or community of life) which the spouses owe each other in justice.* When the true will of the parties is as just described, the acts and assistance apt and necessary for the common good become a conjugal right and duty. On the contrary, when that self-giving and the acceptance of the other is excluded by one or both parties, a radical and initial rejection of that right and duty occurs. In what refers to the historical forms of the contents, it must be taken into account that the personal acts and services *apt and necessary* to establish, preserve, and perfect the community of conjugal life and love undergo many changes through times, places, and cultures because those acts and services are a part of the historical nature of human beings and of their cultural understanding and expression of sexuality, marriage and family. The canonist, therefore, cannot overlook that "historicity" and should not make an universal rule out of certain socioeconomic and juridical customs and circumstances of present Western societies and convert them into archetypes of the contents of the right/duty of the community of life, thus forgetting that in other cultures and among peoples of different levels of development "the solidarity and the sharing of one common life destiny" *is embodied in their own specific and diverse manifestations, which are nevertheless legitimate and rightful.* Finally, the canonist will have to examine whether or not one or both parties may have excluded, at the time of contracting marriage, the mutual owing of those acts and assistance which express, *according to the cultural milieu,* the juridical character (right/duty) of the spouses' solidarity in providing for the living needs of the other party, in sharing the use and the enjoyment of goods, and in the spouse's social status.

d) *The right/duty to mutual help and assistance apt and necessary to attain the ends of marriage and the personal perfection of the spouses*

By the juridical binding of each spouse to the other's future life, as a man and as a woman, and by committing to their unity of destiny, or common life, to the pursuit of the conjugal good and of the procreation and education of offspring, each spouse becomes *the most intimate alter-ego of the other in the pursuit of their common undertaking.* This reciprocal

identification or *intimate companionship due between the spouses in the pursuit of the ends* is expressed in the life of each specific couple through countless and constant acts, forms of behavior, and personal assistance, help, and support. It is not a matter, as it is evident, of listing all possible specific helps between the spouses, for these are too numerous and must be suited to the life circumstances of each couple. At the primary and most basic level, the conjugal good that each spouse receives from the other is not so much *the help* but *the other* person, as a most intimate companion in a common undertaking. From that identification and from the common good, there arises the right/duty to those acts and forms of behavior apt and necessary to mutually realize the intimate and due companionship due in each situation of their married life and not to defraud each other. Those acts of mutual help imply three distinct but very interactive dimensions: they refer, in the first place, to what canonical doctrine used to call *remedium concupiscenciae*, an expression contained in c. 1013 of *CIC*/1917 but not found in the present code, although its meaning is included within the formula "bonum coniugum" of c. 1055 which is, however, not restricted to that meaning. The spouses owe each other mutual help, assistance, and service in order that the psycho-physical, affective, and spiritual dispositions of their sexual love as man and woman be mutually ordered and integrated between them. This is one dimension of the conjugal good, as an end of marriage, which consists of the joint and progressive maturation, from concupiscence to benevolence, of their conjugal love through the entire course of their matrimonial life.

A second dimension of the mutual conjugal help is expressed in the right/duty to those acts, forms of behavior, and assistance by which the spouses jointly support and assist each other in order to create the most favorable conditions, both material and spiritual, for the dynamic pursuit of the specific ends of marriage, or to remove the difficulties and obstacles arising from that same quest.

The third dimension refers to the mutual right/duty to the acts, behaviors, and assistance apt and necessary for the physical, psychic, and spiritual betterment of the other spouse, *as a person*: the spouses must help, assist, and serve each other, as *intimate allies within the possibilities proper of the conjugal union*, in order to preserve and improve those material, corporal, psychological, and spiritual aspects *of each one's personal life.*

e) *The right/duty to accept and care for offspring within the conjugal community of life*

This right/duty aims at the preservation and development of the physical and psychological health of the spouses' common offspring. It derives from fatherhood and motherhood that is part of the spouses' mutual giving and accepting of the entire dimension and complementariness of their own masculinity and femininity. In this sense, then, it is a conjugal right/duty in which the active subjects are the spouses, as spouses, and

the passive subjects are their children, as common to both. In a negative sense, the contents of this right/duty means that the spouses should refrain from any act or behavior that damages the life, the corporal integrity, and the physical as well as psychological health of the children already born. In a positive sense this right/duty means the welcoming of the children within the community of life, integrating them within its life, and establishing for them a type of family life which, originating in the conjugal nucleus, is in itself apt to adequately care for the preservation and the development of the children's health as well as their physical and psychological welfare.

Among the examples of exclusion of this right usually given, we may consider the desertion or abandonment of an infant, infanticide, the offering of the daughters to prostitution, the trafficking in children's body organs, the serious or total neglect of the children's nourishment, clothing, health, and so forth. Deplorable and deserving, indeed, of the most intense repulsion as these actions may actually be, the canonist should not forget that in assessing marriage nullity what needs to be proven is not so much *the actual occurrence of those deeds* as the contracting parties' *willful exclusion of the right/duty* at the moment of establishing this particular marriage, since the cause of the nullity is the exclusion of the right/duty and not those nefarious deeds. However, when such serious actions against one's own children seem to be rooted in a particular individual's personality, even before contracting marriage, it will be wise to examine the case from the viewpoint of the psychic incapacity of c. 1095.

f) *The right/duty to educate the children*

This is a conjugal right/duty because each spouse's fatherhood and motherhood contains an essential educational dimension consisting of the solidarity and common participation of each spouse in the joint education of their common children within the conjugal community. This joint educational task is formed by the spouses' actions, behaviors, example, and teachings, as spouses and parents, addressed to the personal maturation of their children and their adequate incorporation into society. An essential part of this conjugal education towards the maturation of the children's personhood is the parent's duty and right to try to educate them in the moral order understood in its widest sense. The radical rejection of the couple's duty to educate their offspring would amount to an exclusion that invalidates marriage and in this sense. The Roman Rota logically understands that a commitment not to educate the children specifically in the Catholic religion is not an invalidating exclusion, as long as the spouses accept the duty to educate them morally in some form.

A defective education or the spouses' educational failure is not, by itself, a positive act of exclusion, as seems apparent. The object of the positive act is, obviously, the explicit and positive rejection, under diverse modalities and factual presuppositions, of the right/duty understood as a right and a duty deriving from the conjugal union, which is not to be

confused with the bad results or the insufficient quality of the education intended by the spouses.

10. *The properties of the marriage bond and its special firmness in sacramental marriage*

The spouses and the bond that binds them compose the essence of marriage. Unity (one man only, one woman only) and indissolubility (for life) are the two essential properties of marriage. They are called properties because they do not consist of obligations added to the bond and different from it; they are, rather, qualities predicated of the bond and belonging to it; they are the modes of binding that are characteristic of the conjugal bond. They are also called essential because their mode of uniting the spouses to each other and for life emerge from the essence of the conjugal bond.

It is customary to distinguish between unity and indissolubility although this distinction may be carried, sometimes, to the extreme of presenting the two properties as if they were independent from each other. This sort of separation of the two properties could have been fomented by the differences that in fact exist between the two most common historical deviations from the qualities of marriage, namely polygamy, which seems to attempt more against unity, and disavowal or divorce, which seems to go more against indissolubility. In actual fact, unity and indissolubility are the two sides of the same coin, for a breakdown of the indissolubility of marriage always affects its unity, for marriage "for the entire life" is nothing but the unity between the spouses as seen from a time perspective. In that sense, indissolubility is the fullness of the spouses' unity throughout their fullness of life and unity.

The process of the understanding of the unity and the indissolubility of the conjugal bond, both in the collective cultural dimension and in the order of conscience of each singular subject, is the result of the comprehension and acceptance of these juridical and moral exigencies which have their source in the human person, as a man and a woman. By reason of his or her own personhood, each human individual is endowed with an intrinsic worth that is as great as it is unique in each human person. Being the reflection of the order of being over the order of good, such worth belongs to each person and remains always with the person. The worth of each human person, therefore, is not subject to conditions, for it is intrinsic to the person and permanent, and it must be acknowledged under any circumstance, including those of the person's own life that are due in justice. The canonical concept of the man and the woman mutual gift and acceptance of self implies the giving and accepting of the persons in their sexual natures and a value that is intrinsic to the person and is not conditioned, therefore, by circumstances of health or illness, richness or poverty, joy or sadness, moral betterment or decay, beneficial or non-

beneficial results, and not subject, in short, to the lights and shadows of the circumstances of life, which cannot alter the intrinsic and unconditioned worth of the gift itself. The concept, then, of the unity and indissolubility of canonical marriage is a reflection of the understanding and the living realization that the sexual union between a man and a woman is a union of persons. In the opposite direction, the loss of appreciation for the unity and the indissolubility of marriage leads to a collective and individual depersonalization of the conjugal union between a man and a woman, for placing a condition on the mutual giving and acceptance introduces into that type of union the internal germ of its possible dissolution.

Since the Church acknowledges and protects the demands flowing from the personal character and dignity of man and woman as fundamental elements of the human anthropological patrimony, the Church upholds the unity and indissolubility of marriage as requirements of the truth about marriage rooted in human nature itself. At the same time, *this same entire natural reality* that is the conjugal union *was raised* to the order of sacramental grace by the will of Christ (cf. c. 1055). So *this same conjugal union* (the same natural consent, bond, and ends) is a participation, for the baptized spouses, in Christ-Spouse of the Church (a specific matrimonial "conformation" in Christ) as well as an entitlement to the graces needed for the conjugal union to be the efficacious sign of the spousal union between Christ and his Church. In a very profound sense, then, Christ is the Spouse to each baptized spouse and marriage becomes, by reason of its sacramental dimension, a specific and efficacious way of sanctification and redemption.

The *special firmness* (cf. c. 1056) that the natural unity and indissolubility of the bond acquire in the marriage between the baptized derives from their participation in Christ. By virtue of this participation, Christ confers to marriage the capacity to signify the "one and indissoluble" fullness of Christ's gift of self to his Church and of his acceptance of the Church with unconditional fidelity and love forevermore. That capacity also implies the special sacramental graces of marriage as well as the consequent demands of firmness. Even when a judgment of "natural" reason, or a merely human outlook, could perhaps categorize a marriage under certain circumstances and situations as "scandalous or foolishness," the ratified and consummated marriage between the baptized is never a meaningless life episode. For Christian marriage always contains a profound supernatural meaning and an efficacious redemptive power since it has received, always and in every situation, the capacity to share in the being and the life of Christ-Spouse, who remains united to the Church, by the love of the Spirit and by his incarnation in human nature, as the unfailing Spouse regardless of the Church's historical circumstances.

The interpreter of matrimonial canon law must be respectful and faithful to the sacramentality and to the firmness of the unity and indissolubility of marriage between the baptized, mainly when judging about the

presence or the absence of the essential properties in each particular case. The interpreter needs the perspective of faith, which sacramentality requires, mainly when interpreting those painful conjugal situations that may seem humanly illogical and in which the indissolubility of the bond may appears as "scandalous or foolishness." It should, indeed, be taken into account that the true "valid" bond of a Christian marriage can coexist with a painful conjugal situation or one in which conjugal life seems to have broken down. In those situations, the indissolubility of the bond retains the profound significance and power of the crucified Christ-Spouse. It would be rather paradoxical that the sacramental dimension of the unity and indissolubility of the marriage between Christians would be weakened or lost precisely among the cultivators of canonical doctrine. A lack of confidence in the precept of c. 1056 would contribute to obscure the greatest legacy of the divine redemption left by Christ to the Church, namely, the power to participate in Christ's capacity to love each human being, with his or her limitations and failures, even to death and death on a Cross. For this specific "conformation" with Christ, with its specific attending grace, has been granted, *ex opere operato*, to the love of Christian spouses between themselves and towards their children under all circumstances of life.

Concerning sacramentality itself, the possibility of a determining error, and its differences with simulating intention, *see* commentary on c. 1099.

11. *The exclusion of unity*

a) *Concept*

The conjugal bond is *one and exclusive*: it binds one man only with one woman only. There cannot be two bonds, one binding the man to his wife and another binding the woman to her husband. There are not two unions, but only one union and one binding principle uniting the couple in marriage. Nor can there be, therefore, a marriage that would bind one of the spouses but not the other, for the existing bond equally binds the two spouses. For the same reason, the same and only bond cannot be monogamous for one and polygamous for the other. The bond, with its properties, its essential rights and duties flowing from it, and its ordination to the ends, forms a treasury of goods held in common whose co-ownership belongs in justice to the spouses only and excludes any third party from it. In this sense, if one of the parties at the moment of contracting intended to share with a third party any of the essential elements of this exclusive and excluding conjugal common holding, such a contracting party would be excluding the unity of marriage.

In addition, the one single bond is *total*, although it is very important to add that this is so within a very specific, not generalized, ambit: it is total in reference to the conjugal relationship which man and woman, as

such, can attain. In this specific sense, the marriage bond comprises and gathers all the aspects of the masculine and feminine sexual inclination and complementariness related to sharing, developing, and preserving the mutual conjugal good as well as the procreation and education of offspring. This specific unity and totality of the bond is the source of its exclusiveness and of the fidelity between the spouses, and this exclusiveness and fidelity of the bond, which derive from its unity and totality, is what canonical doctrine calls the "property of unity" or, to say it with the Augustinian terminology, the *bonum fidei.*

b) *Theoretical foundation*

The unity of the bond rests on the fact that the sexual complementariness of human masculinity and femininity exists between *personalized bodies* or, if so preferred, between *corporeal persons.* Since there is only one person in each body, under either a masculine or a feminine modality, full sexual complementariness occurs only between two persons, one masculine person and one feminine person. A masculine person receiving the entire gift of femininity from several feminine persons could not give himself entirely to any of them *because the one personhood of his masculinity could not be divided without a personal decline or depersonalization*; and likewise, the feminine person receiving the entire gift of masculinity from several masculine persons *could not give herself entirely, and at the same time, to any of them because her feminine personhood would not be divisible and sharable without undergoing her own depersonalization.* In addition, the gift of one's person, through the entire gift of self as man, demands the other person's gift of self as woman in terms of *a strict equality of each one's value and dignity* because masculinity and femininity are two complementary modes of being *equally* human persons. Canonical doctrine has always regarded the unity of marriage as a property demanded by the personal equality of man and woman.

On its part, *fidelity* means, in terms of conjugal rights and duties, the spouses' full and exclusive co-ownership of each other, so that should any of them share with a third party their respective personal masculinity or femininity, which they gave and accepted entirely to each other in justice, they would *defraud each other in what is theirs.*

c) *The intention to establish a polygamous and concubinary union*

The most ancient historical form of excluding the unity of the bond is the *polygamous matrimonial will* inspired in cultures that discriminates against the worth of one of the two human sexes. Any form of polygamy implies a *subjugation and unjust appropriation* of one sex by the other. It represents a cultural consecration of inequality between the sexes and of discrimination against their equal dignity and worth: one sex subjugates the other and the dominant one appropriates the one subjugated which, in the end, causes the depersonalization of the matrimonial relationship and the replacement of the interpersonal character of marriage with mere functional roles in which the discriminated sex suffers the

greatest degree of being used and of becoming a thing. The man who takes several wives cannot give himself entirely, as a masculine person, to all his wives (polygamy) but uses them, and the woman who takes several men cannot give herself entirely, as a woman, to her husbands (polyandry) but uses them.

Polygamy is a precise *fattispecie* that cannot be confused with certain attitudes contrary to fidelity and indissolubility. A polygamous will is understood as the actual will, or the non-revoked virtual will, on the part of one or both contracting parties to reserve the right to contract a new bond, equally matrimonial, with a third person while *replacing the first bond or coexisting with it.* The object intended, therefore, is not to contract a new matrimonial bond after canceling the first, but to have two or more compatible and simultaneous bonds with the corresponding spouses entitled with certain spousal rights. The polygamous will is, therefore, directed against the exclusivity of the conjugal bond, which is the most radical and primary common good of the conjugal order to be shared by the spouses exclusively between themselves.

Another modality of the exclusion of unity to be taken into account is the *concubinary will,* that is to say, the reserving to oneself the right to have other types of intimate relationships, parallel to the matrimonial bond, with third persons of a second spousal rank, socially recognized and implying certain juridical duties towards the third persons and towards the offspring resulting from the relationship.

From the investigation of the particulars of each case in a predominantly polygamous culture, the canonist should elucidate whether the case is one of error about unity determining the will (c. 1099), or one of voluntary exclusion of unity motivated by a non-determining cultural error (c. 1101 § 2). The fact that the contracting party's dominant culture may be monogamous, and bigamy may be a crime, does not in itself impede the existence of a polygamous will. However, in those rare situations, great caution should be taken to examine if the will of the contracting party was to exclude fidelity and indissolubility, which will be the more frequently the case; or if it was rather a case of non-fulfillment of the duties initially contracted in a valid manner, even though in actual practice the party's intention to exclude, or to not fulfill, may have taken the form of attempting another nuptial ceremony because of some particular reasons.

d) *The exclusion of the right/duty to fidelity*

In order not to impoverish the real scope of conjugal unity, it is necessary to note that the exclusion of unity comprises not only the exclusiveness of the bond, which is denied by the polygamous and the concubinary will, but also *the exclusiveness of the essential rights and duties of marriage.* In its most profound significance, *conjugal fidelity* means that the *foedus matrimoniale servandus est* between the spouses,

that is to say, that all the commitments of the conjugal covenant constitute rights/duties containing the juridical demand (*ius radicale*) that it should be loyally and faithfully fulfilled exclusively between the spouses. The exclusive unity and the juridical character of the bond strictly affects the rights and duties that flow from the bond. Matrimonial fidelity consists of the will to establish those right/duties and to fulfill them as the exclusive common good of the spouses.

Consequently, the exclusion of fidelity can originate from the repudiation of the exclusiveness of an essential right/duty or from refusing to establish and fulfill it as a juridical right/duty, even though the contracting party may still accept fidelity as a gratuitous situation of fact not implying any exclusive obligation in relation with the other spouse. (For the enumeration of those essential rights/duties, *see above* no. 8 and commentary on c. 1095 § 2). We must insist that, by virtue of their essential quality, all the essential rights/duties enjoy the note of reciprocal exclusiveness and can be the object, therefore, of a simulating exclusion that invalidates the marriage thus contracted.

The notion and the contents of conjugal fidelity have been traditionally interpreted in relationship with the sexual act or coitus, for this is the paradigmatic act of the intimate relationship between the spouses. In canon law, the confining of the essence of marriage to the erstwhile *ius in corpus* by some old sectors of canonical doctrine contributed to limiting the meaning of conjugal fidelity to the reciprocal obligation to the exclusive *ius in corpus*. Although the concept and the contents of conjugal fidelity are not limited, as mentioned above, to the right/duty to the conjugal act, it includes the most common and traditional concept of the right/duty to an exclusive sexual intimacy and to its paradigmatic expression, which is the complete sexual intercourse. Consequently, the voluntary rejection to establish *exclusivity* among the spouses of the right/duty to the conjugal act, naturally ordered to the possibility of having offspring, brings along with it the invalidation of marriage.

Among the most frequent situations of fact that exclude fidelity, in its strict meaning, jurisprudence and doctrine include the following: in the first place, those forms of the *ius adulterandi* in which one or both contracting parties reserve the right to sexual intercourse with persons other than one's spouse, those situations in which the spouses reserve the right to a third person's intervention in the natural sequence of the acts ordered to the procreation of the children, or those other presuppositions in which the spouses accept the right of the other spouse to sexual intercourse or intimate sexual contact with a third person. In the second place, the reserving to oneself the right to sexual practices *contra naturam*, whether hetero or homosexual, with a person other than one's spouse constitutes an evident presupposition of exclusion of fidelity because the contents of fidelity is not limited to the complete act of sexual intercourse but refers also to other personal acts which, forming part of a person's

sexual intimacy, are included within the order of conjugal *exclusivity.* In the third place, and for the same reasons, fidelity in its strict meaning is excluded by reserving to oneself the right to *intimate sentimental, affective, and love relations specifically proper of the sexual inclination* between man and woman (by their being a man and a woman) with persons other than one's own spouse which, not implying the complete sexual union in a formal sense, are nevertheless within the contents and the scope of that intimate familiarity and co-ownership of the love, affection and sentiments proper of the matrimonial relationship

e) *Meaning and limits of the distinction between the right (*"ius radicale"*) and the exercise of the right (*"usus iuris"*)*

The distinction between the right and the exercise or use of the right is a traditional technique employed to assess those presuppositions in which acts contrary to unity, exclusiveness, and fidelity have existed through the course of married life. The question is to find out whether a given fraudulent conduct may be due to the will, existing at the moment of contracting, not to contract the radical *right* (*intentio contra ipsum ius, contra ius radicale exclusivum*) or not to accept the obligation or duty (*intentio non sese obligandi*), or whether those acts and conducts are, rather, abuses originated during the matrimonial life by which the person violates the right/duty to fidelity duly contracted at the time of the wedding and to which the person was freely and voluntarily obligated (*intentio non adimplendi, contra exertitium iuris, contra ius mere expeditum*). Since those factual presuppositions are quite varied, the canonist must be very careful to evaluate the person's *initial will* at the moment of the marriage *in fieri* or act of contracting. For this purpose it is necessary to examine the antecedent lifestyle of the contracting party because the person who does not contract the right, or who intends not to be obligated by the corresponding duty, contracts invalidly, while the one who fails to fulfill *de facto* only is implicitly accepting the *de iure* obligation, over which he or she defrauded, by the very fact of acknowledging its *non-fulfillment.* In other words, the person is implicitly confessing that, at the moment of the marriage *in fieri,* the party was obligated *de iure* to *that thing* which he or she did not *de facto* fulfill during the marriage *in facto esse.*

The differentiation between the right and the exercise of the right, and between the constitution of the conjugal duties, at the moment of consenting, and the *de facto* non-fulfillment of those duties through the course of marital life should not be carried beyond its natural meaning. That distinction corresponds to the evident human experience that we can fail to fulfill obligations truly acquired and that such discrepancy between duty and actual conduct is frequent due to the fragility of human behavior even against the best intentions. The distinction, then, between the true constitution, at the moment of consenting, of the right/duty to spousal fidelity and the occasional or frequent non-fulfillment responds to real life and practical experience.

The very important consequence following the distinction between the right and its exercise is, as it is evident, that adultery and infidelity through the course of the marriage *in facto esse* does not demonstrate, just by itself or mechanically, that the violator excluded the very right/duty to fidelity when marrying (in marriage *in fieri*) and thus contracted invalidly. For one of those particular presuppositions to be labeled as simulation, it is necessary to prove not just the fact of infidelity but also that such conduct originated in the will, or consent of the contracting act, to positively intend a union devoid of the right/duty to conjugal fidelity (i.e., by excluding the *ius radicale exclusivum*). Given that the invalidating exclusion occurs in the act of contracting, through an unrevoked actual or virtual will, one understands the decisive importance, in the first place, of the *antecedent and concomitant proof* of the *in fieri* and, in second place, that this antecedent and concomitant proof forms a *consistent life-style* (a congruent series of acts and attitudes) with the infidelities which occurred in the subsequent marriage *in facto esse.* Many marriage cases before the ecclesiastical tribunals present frequent facts of non-fulfillment of the conjugal commitments contracted in marriage. When there is no antecedent and concomitant indicators to explain the subsequent infidelity by proving *a posteriori* the existence of a positive *a priori* exclusion of the very right to fidelity (*ipsum ius radicale exclusivum*), then the presumption *iuris tantum* prevails that the deeds of infidelity through the course of the marriage *in facto esse* were simply failures to fulfill the right/duty and that marriage, therefore, is valid.

Note that the distinction between the right and its exercise is meaningful only in so far as it reflects, based on the experience of life, the mutual autonomy of what a person *wanted* at the moment of contracting (marriage *in fieri*) and what actually happened through the course of married life (marriage *in facto esse*). The right and the exercise of the right belong to two different moments of time and two different orders of being: on the one hand, the will contrary to the right or to the duty of fidelity occurs only at the moment of contracting and belongs to the *ordo iuris* of establishing or rejecting the juridical conjugal bond with its contents of juridical rights and duties; being thus part of consent itself, the will contrary to that right or duty invalidates consent. On the other hand, the use of the rights and duties occurs through the actual lifetime of the marriage already established and the abuse belongs to the *ordo facti*, or facts occurring throughout the marriage *in facto esse*; not being an essential part of the consent that establishes marriage, the factual non-fulfillment cannot invalidate it. However, if the distinction between the establishment of the right and its use in actual fact does not correspond to the real difference between marriage *in fieri* and marriage *in facto esse* or between the *juridical* act of consenting and the actual *facts* of married life, then the distinction is meaningless and can be misused along two opposite directions.

The first misuse of that distinction would be to conclude that infidelity throughout matrimonial life is an unmistakable sign of simulation about the right/duty to fidelity at the very moment of having consented, mainly if frequently perpetrated and having caused the marriage breakdown. However, neither the frequency of infidelity, which is merely a quantitative criterion, nor the spouses' failures, which can explain the fracture of common matrimonial life and are indeed cause of separation (cf. c. 1152), are facts contemplated in § 2 of c. 1101 among the requisites of the exclusion of marital unity or fidelity. Consequently, those reasons for the breakdown do not, by themselves alone, invalidate marriage. Such a type of reasoning would render meaningless the distinction, which is the foundational stone of canonical marriage, between marriage *in fieri* and marriage *in facto esse* or, amounting to the same things, between infidelity within consent and infidelity as an incident of marital life, or between the *ordo iuris* and the *ordi facti.*

Another misuse of the same distinction, no less warranted but coming from the opposite extreme, is to hold that the contracting party is able, at the moment of consenting (*matrimonium in fieri*), to split the unity of the right/duty to fidelity into two different and independent objects: to will the establishment of the right/duty and will, at the same time, *to reserve the right to not fulfill it.* Accordingly, the reserving to oneself would refer only to "the use or exercise" of the right while the existence of the right within the act of consent would remain intact. By this contrived split between the right and its use in the same act of contracting, infidelity would not invalidate consent. This type of reasoning by which the right/duty to fidelity, on the one hand, and its life exercise, on the other, can be split within the same act of contracting represents a fundamental error: infidelity is always an abusive fact and can never be a right. The distinction between the right and the actual use of the right can only be applied to the facts of matrimonial life, or marriage *in facto esse*, being examined, since it is evident that a valid marriage can become evil and fraudulent as it develops in practical life. That distinction cannot be applied to marriage *in fieri*, or act of contracting, because obligating oneself to fidelity and reserving to oneself, within the same one act, the right to not fulfill is an irremediable contradiction, and this is so because by the reserving to oneself, at the very moment of contracting, the right to abuse the obligation is always a restriction *de iure.*

In marriage, the contracting parties are also the object of their own consent in what refers to their conjugal dimension as man and woman; the giving and accepting of their selves cannot be separated or severed from their actual life activity, as if they were mere objects of some economic rights. Rather, in their marital consent, the spouses cannot separate their being from their lives without splitting the very person whom they mutually give and accept. Since the conjugal giving and accepting refers to the spouses' own self, the act of giving and accepting produces, *indole sua*,

the unity of the spouses' beings, as man and woman, as well as the unity of *each one's self with each other's life*; and since the object given and accepted in marriage consent, which is the spouses' self, is indivisible, the resulting unity constitutes the consortium of the entire life which, when juridically due, forms the essence of marriage. To hold that the right/duty to fidelity can be separated from its exercise in the same act of contracting (or mutual giving and accepting of self), even to the point of establishing the right to fidelity in coexistence with a right to not fulfill the first, would mean that the initial intention to defraud in actual practice would be irrelevant which would then lead to the unacceptable conclusion that the principle of unity between the person and his or her life would be nonexistent.

f) *Judicial and doctrinal presumptions*

It may seem idle to recall that it is not up to the judge, nor to canonical authors and interpreters, to seek ways of facilitating or restricting the nullity of marriage. Quite often, however, this prejudice is present behind certain applications and interpretations of canonical matrimonial law. This prejudice distorts the understanding of the grounds of nullity and is the source of radical changes in the use of the presumptions in which, in the end, the moral certainty of the existence or inexistence of a simulating will is founded, since in itself, *vis-à-vis*, the voluntariness cannot be externally perceived.

For a long time, for example, the resolve to continue, after the celebration of the nuptials, a sexual relationship with a person other than the spouse, which had been initiated before the marriage, was not considered as proof of the will to exclude fidelity. It was even held by some that a promise of faithfulness to the lover kept before and after the wedding was not sufficient proof of a will to exclude fidelity with one's spouse. Recently, the course of those presumptions has radically changed and it is now presumed that the person who married with the intention of maintaining sexual relations with a stable concubine or lover excludes fidelity. We could give many more examples.

It is not a matter of making an exhaustive list of practical cases and of the presumptions specifically used in each particular case because, quite often, the prudence and reasonableness of the presumptions employed presuppose some very specific circumstances, as proved in a particular case, so that the presumptions used in one case cannot be transferred to other cases, similar in appearance, as apodictic criteria and much less as categorical elements of the *propio caput nullitatis*. Along these lines, it is more reliable for the canonist to assess the case, first of all by having a good understanding of the cause of nullity and of the positive values of marriage, for a *caput nullitatis* always represents, in fact, the absence of real marriage. The assessment of the case requires, in the second place, a good knowledge of the technical structure and the formal

elements that the legislator has used to define the *caput nullitatis*. Finally, the canonist must have the most complete knowledge of the particular facts of each specific case, which is always singular, by means of an instruction that should be as immediate and complete as possible.

12. *Exclusion of indissolubility*

a) *Concept of indissolubility*

The indissolubility of a ratified and consummated marriage is to be understood as the specific strength of the marital bond in uniting the spouses which can be neither weakened nor destroyed, whether from within or without, by any other force, circumstance or event, except the death of the spouse. In other words, the conjugal bond is an ever-flowing source of energy uniting the spouses, while they are alive, and identifying the persons and their state of life resulting from the fact of their being spouses. In the living dynamism of the valid bond, the loss or the cancellation of this power of union is not possible, for the bond contains no inner weakness and no fault could be inflicted from without. Rather, it is a characteristic property of the conjugal bond to possess the strength to unite the spouses, as spouses, through their lifetime in an intimate identity and co-ownership that is superior to that of a blood relationship, "for a man leaves his father and his mother and cleaves to his wife, and they become one flesh" (Gen. 2, 24; cf. Mt. 19, 3–12). In that sense, then, indissolubility is the fullness of the unity of marriage in its temporal or biographical projection.

The property of indissolubility, seen as the life-long and full strength of the bond uniting the spouses, includes three levels of binding power: stability, perpetuity, and, in the strictest sense, indissolubility. Although these levels are inseparable when considering the uniting power of the valid bond, it is useful to distinguish them conceptually because the arguments properly supporting it may, in some cases, clarify its stability or its perpetuity more than its indissolubility, in the strict sense, and because in relationship with the simulating intention, the positive act of exclusion is nuanced differently when directed against stability, perpetuity or indissolubility itself.

b) *Arguments for indissolubility*

The *stability* of the bond is based on the ends of marriage and especially on the procreation and education of offspring. This end is jointly achieved and requires a long time-period of the spouses' life as well as the creation and perseverance, by the spouses, of a non-fleeting but permanent ambience of common and educational life which, in one way or another, all cultures recognize as a primary form of society and state of life. When determining the degree of minimal knowledge required in the intellect of the contracting party for marriage consent to exist, c. 1096 refers to the stability of the bond with the expression "permanent partnership."

The *perpetuity* of the marriage bond is based on the male and female complementariness of sexual human nature. Marriage represents the unity of the persons in their respective sexual nature and marital consent actualizes the potential for the unity contained in human nature's sexual duality. From the moment of attaining sufficient psychosomatic maturity, the human capacity for complementariness between masculinity and femininity is not an intermittent or a transient condition, but one that encompasses a person's entire life, for its different aspects and diverse elements are fully displayed only through the course of years and stages of a man's and a woman's lifetime and end only in death. It is not possible to separate the person from his or her masculinity and femininity, that is, from his or her specific sexual nature; nor is it possible to separate the person from living the unfolding of his or her personal history. Being a man or woman, i.e., a complementary human sexual nature, is a permanent reality and essential to the human person that does not decline or devaluate and never fades away throughout the life history of each man and woman.

Finally, *indissolubility in the strict sense*, that is, as the culmination of the bond's stability and perpetuity, is based on the nature of marriage as a union between persons. Indissolubility so understood verifies the real and irreversible power of freedom to generate the mutual identity of the spouses and their reciprocal, personal self-making when they assume, through the giving and acceptance of self, the *una caro*, or capacity for unity, entailed in the dual complementariness of human sexuality. In that sense, indissolubility means that marriage is not just a fact of human nature and its procreative end or, as said in more traditional terms, a matter belonging to the order "of the species and its reproduction," for marriage also contains, in a more profound level, a specific interpersonal attainment with reference to the spousal nature of human sexuality and procreation. In addition, the irreversible co-identifying force (being a spouse) that freedom generates supports, in its turn, the personalized genealogy that is due to every new human being: this is the intraconjugal filiation by which every human person can be referred, as son or as daughter, to an origin consisting of a father and a mother united as spouses.

When we say that each human being is a person, we are not only formulating a *general* conceptual definition applicable to all human beings; more exactly we are saying that each human being is *a single and unique individual,* master of oneself and capable, as part of the person's power of self-determination, of constructing and completing his or her own identity. The person does not attain that power of "self-realization" in isolation but through a constitutionally interpersonal process consisting of a sequence of self-giving and other-accepting that, by interaction and sharing, constructs and completes the person's identity and jointly generates the most basic elements that define the identity of each human person. The condition of being a man or a woman is the first component of the interpersonal communication between human beings; then, the free and reciprocal giving and accepting of self, as man and woman, originates a

sequence of joint interpersonal relationships on which rests the basic personal identity and genealogy of each human being, that is to say, the condition of being this son or daughter, this father or mother, this spouse. When through the gift and acceptance of self, a person truthfully says to another, "*you are* my wife and *I am* your husband, *you are* my son and *I am* your father or mother," that person is jointly generating, really and effectively, a personal identity by freely assuming his or her own nature. By means of such specific intervention into the life history of another human being, the person jointly generates, through the free giving and acceptance of self, the *unique, most individual, unrepeatable, and irreversible identity.* The joint generation of the personal identity is indelible and irreversible because a person's identity is the person's "own" basic patrimony and the reference of the *I* to other personal beings as his or her own, insofar as these have truly given themselves to and have really accepted him or her and can be said to be *my* husband, *my* wife, *my* father or mother, *my* children. Such identity is not something that one *has*, but something that one *is*, so that, in the person receiving it, the identity is definitive, indelible and irreversible because the very personal being that one receives has been jointly generated by the truthful gift of love of the person giving herself or himself: being a spouse means having received, as a personal gift, the femininity or masculinity of this specific woman or man. Being a son or a daughter means having received the personal gift of his or her own origin from a father or mother who, as generators of his or her life, are his or her father or mother.

The indissolubility of marriage is based, therefore, on the power to jointly generate the personal identity implied in human sexuality when the latter is assumed and consummated by a free act of self-determination. The identity of "being spouse," which is received from the gift of the other, is received as person, that is to say, as property that is *his or her* and defines the receiver definitively and irreversibly. In fact, "indissolubility" of marriage, in the strict sense, is the quality that jointly generates the indelible and irreversible personal identity of the spouses between themselves and of the spouses and their children. This power belongs to the conjugal bond once the reciprocal free giving and acceptance of their man/woman condition (with its potential paternity and maternity) is consummated. The indissolubility of marriage relates the living fullness of conjugal life to the transmission of life in a personalized manner and it establishes freely the origin of consanguinity. In turn, this empowers children to transcend their own blood origin by means of a new free act that initiates their own and more profound conjugal joint identity.

The natural indissolubility of marriage acquires special firmness in a sacramental marriage, for Christian spouses are configured, through baptism, into Christ as children of God so that their identity of origin is God the Father. When the children of God in Christ contract marriage, their very being and their identity as spouses receives the irreversible gift of Christ-Spouse and, as parent, they participate in the genealogical line

(procreation and education) of the children of God. The Christian spouses' specific matrimonial conformation in Christ and the action of Christ-Spouse, within their conjugal union, empower marriage's natural indissolubility (i.e., the spouses' natural conjugal joint identity) to signify the unfailing and irreversible spousal union, in body and spirit, of Christ with his Church, which is the spouses' supernatural joint identity with Christ-Spouse. As c. 226 points out, sacramental marriage is a specific way of sharing in the building up of the Church because, as sacrament, it has been incorporated into the economy of redemption. Its indissolubility is a sign of the unfailing spousal love of Christ and of the unchanging efficacy of the redemptive power of Christ-Spouse who, through every favorable or arduous incident of married life, acknowledges the Christian spouse as "His spouse."

c) *Forms of the exclusion of indissolubility*

The most elementary way of excluding indissolubility is to reject the *stability* of the bond. By reason of its stability, the conjugal bond is totally different from those other connections or relationships between men and women which are passing, transitory, sporadic, or provisional and which are explicitly initiated, sustained and ended as not permanent and are, at the very least, incapable to generate that common state of life or shared life history required by marriage's ordination to offspring. When one or both contracting parties truly desire, under the guise of the nuptial sign, a relationship that is in itself transient and sporadic and do not want to establish a stable consortium between them, then the marriage is null by reason of having excluded that component of indissolubility that is the stability of the bond.

Directly attacking stability are the so-called "trial marriages," which in reality are feigned marriages, since the real transitory and provisional period of probation for marriage is courtship. A "trial marriage" is characterized by the contracting party's will to initiate, under the guise of the nuptial sign, an experiment about certain aspects of married life while reserving to himself or herself the right to approve or disapprove of its outcome. At the moment of initiating this experiment, the party's will about the future is to either convert the experiment of common life into marriage if the experience is positively evaluated, or to end common life if the experience is negative. This analysis of the party's will shows that, in either case, the indissoluble conjugal bond is deferred, not by the verification of a future event uncertainly known, as in conditional consent, but by the party's decision to eventually approve or disapprove, which was within the party's power from the start. The object intended by the contracting party's will is not so much the marriage to be approved or not approved in the future than to pretend or to experiment about some aspects of marital life which, by being only an experiment or test, is *in itself temporary.* Since the resolve to marry in the future is different from the consent given in the present, even if the test turns out to be satisfactory, and

since the reservation of the right to disapprove the experiment implies a will to establish a relationship in itself provisional and transitory, it follows that the so-called "trial marriages" are null because of exclusion of the stability or permanence of the consortium which, between mutually truthful spouses, is the first step towards the indissolubility of their union.

The second way of excluding indissolubility derives from rejecting the *perpetuity* of the bond. Even when the contracting party wants to establish a stable consortium, the same party may positively intend a conjugal partnership that is not perpetual but temporary. This form of exclusion comprises many situations of fact which, in turn, can be caused by a great variety of motives for excluding perpetuity, including error and fear. The common denominator of those situations is the parties' intention to contract a bond that unites them not perpetually but temporarily or *ad tempus* as, for example, "while the feelings of love or the sexual attraction last," "until we have children or after the children reach their majority," "while happiness lasts," and so forth; in short, until the contracting party attains a subjective end but no farther. In those situations, the consortium is thought of and desired as stable for period of time and, in this sense, there is no rejection, while the marriage lasts, of that married state of life deriving from the marriage celebration. The marriage is desired as a temporary state and as a temporary identity and the duration of the marriage is made to depend, by its very constitution, on the attainment of some subjective ends beyond which the bond is not to last. At the basis of this type of consent there hides a radical "conditionality" of the gift of self and the acceptance of the other frontally at odds with the perpetual worth of the spouse, as man or woman, as well as temporary utilization (i.e., while convenient) of certain aspects of the spouse and of their life in common.

Perpetuity is, then, excluded not only when the person contracting foresees the time period during which the conjugal bond is to last, but also when the contracting party intends to establish a marriage bond of "indefinite duration" in which "the bond is maintained in existence" by a certain type of "steady consent." In the latter instance, as it is evident, the contracting party substitutes the objective perpetuity of the *juridic* bond, which the party neither intends nor establishes, with a *de facto* perseverance of consent, which is the one actually rendered under the guise of the nuptial sign. The result is that the perpetuity of the bond is replaced by an indefinite temporal consent that is "continuous but reversible," and since this type of consent cannot be the efficient cause of the conjugal bond, the marriage thus contracted is invalid.

Finally, *indissolubility can be excluded in the strict sense, that is, directly.* In this case, the will of the contracting party is not opposed to the stability of marriage but intends, in fact, to establish a permanent consortium, nor does the party intend a definite or indefinite transient union, but hopes and wants a union for life while, at the same time, the contracting person *reserves a radical juridical power* to dissolve the valid juridical

bond. This can occur on the person's own authority (divorce by mutual agreement, or after certain time of separation of fact if this is a cause of divorce in the civil legislation) or by recourse to the competent authority (divorce by judicial process). That exclusion occurs when the so-called *ius divortiandi* accompanies and forms the matrimonial consent: the person consents while reserving the right to dissolve the marriage, reputed valid or existing, by a power extrinsic to the bond that cancels, juridically and effectively, the bond's binding strength.

There can be many and varied motives for a person to exercise a *ius divortiandi*, and these can even be the same motives as those for excluding perpetuity, such as the disappearance of love, an unhappy common life, the wish to marry another person, and so forth. The difference between the exclusion of perpetuity and the use of the right to divorce is as follows: in the first, the will of the contracting party wants from the start a temporary marriage, that is, a marriage that can be terminated so that when the parties separate, it is because the initially temporal bond has ceased to bind; in the second case, the will directly excluding indissolubility reserves the power or right to dissolve a valid and existing bond in such a manner that this juridical and social power to dissolve the bond prevails over the binding force of the valid marital bond.

Underneath a person's reservation of a *ius divortiandi* there is an implicit or explicit pretense to retain a power to dissolve what is valid; this is why jurisprudence tended to presume that, among Catholics who had been educated on the extrinsic indissolubility of the ratum and consummated marriage, the explicit, or even hypothetical, initial intention to have recourse to civil divorce, strongly supported the presumption that the contracting party, having been well informed and aware of that intention, had made a positive act of the will against indissolubility when considering having recourse to civil divorce. This positive act of the will, however, was thought to be psychologically unnecessary, and therefore presumably nonexistent among non-Catholics educated in a legal and social environment where divorce was common. Doctrinal and jurisprudential interpretation in present times uses those presumptions in less stereotyped fashion and the condition of being Catholic or non-Catholic is regarded as a situation of fact of no single directional proof but as circumstantial indicators to be assessed within the particulars of each specific case.

The initial will not to consummate marriage in order to obtain its eventual dissolution also flies against the indissolubility of marriage. Besides the fact that this intention implies a unilateral reservation of the right/duty to the conjugal acts, this type of consent is also null because it excludes indissolubility. Rotal jurisprudence has rightly pointed out that the party's intention to seek a pronouncement of dissolution from the public authority has no other meaning than to achieve the party's initial intention to dissolve the bond at his or her own will. This, however, is to be distinguished from the legitimate and not invalidating agreement between

the spouses not to exercise the right/duty to conjugal acts, including consummation, provided that the parties intend to contract indissolubly and to truthfully give each other the right/duty to those conjugal acts. In this case, the agreement between the spouses refers only to the non-use of the right/duty, because of a just cause, while accepting the existence of the same right/duty to the point that each spouse can demand its exercise at any time without invoking any other title than their condition of spouses. The initial intention to ask only for conjugal separation, for a just cause, does not fly against indissolubility. The initial intention to keep a right to separate, to be exercised at any time and for no other cause or just reason than one's own free will, would place the case within the context of a *possible* exclusion of the right/duty to the intimate community of life.

d) *The impropriety of applying to indissolubility the distinction between the right and its use*

Indissolubility is the specific power, proper of the conjugal bond, to unite the spouses during their entire life. From this it follows that it is not possible to separate the right to indissolubility from its use or exercise in opposition to the same right, as can happen, for instance, between the duty to fidelity and an adulterous conduct in actual fact, or between the end of procreation and the actual use of contraception. Indissolubility is not one use of the bond among others, for either the bond actually binds and binds always, or it simply does not bind, i.e., it does not exist.

The impropriety of applying to indissolubility the distinction between the right and its use is unanimously admitted by canonical doctrine. This teaching goes back to St. Thomas Aquinas who reasoned that "since from the very fact that by the marriage compact, a man and a woman give to each other the right of one over the other in perpetuity, it follows that they cannot be put asunder [vincular divorce]. Hence there is no matrimony without inseparability, whereas there is matrimony [in actual married life] without 'faith' and 'offspring' because the existence of a thing [the ordination to offspring and to the duty of fidelity needed in marriage *in fieri*] does not depend on its use [during the marriage *in facto esse*]" (S. Th., *Suppl.*, q. 49, a. 3).

13. *Proof of the exclusive positive act: general criteria*

a) *The possibility of an act or a law being indubitably proven to be an element of the positive act of exclusion*

We have defined the act of simulation as a voluntary act that objectively falsifies the truth of marriage and supplants a valid consent. But to be recognized as such, the act of simulation must be open to juridical proof. This is no incidental matter, for if there were no possibility of proof, then simulation would not be an excluding act under the law. The reason

is simple. Under the law there is always another juridical act, consent manifested in the proper form, alluded to in c. 1101 § 1. If it cannot be found that there is a simulating act that would ultimately exclude the juridical act, it is obvious that *the only act remaining under the law* is consent manifested as a nuptial sign. Consent manifested as a nuptial sign presumes congruence with the internal will, as established in c. 1101 § 1 and also enjoys the general principle of law shown in c. 1060, under which the validity of the nuptial sign celebrated prevails in case of doubt between fact or law.

Given the force of the presumptions in c. 1101 § 1 and c. 1060 taken together, it can be rigorously stated that *the excluding effect of a positive act of simulating will is related to the fact that it is an act open to proof under the law, and this probatory condition is a part of the concept.* In that case, the *only juridical act* that can be fully effective under the law is marriage consent externally expressed in the nuptial sign. Consistent therewith, the burden of proof beyond any doubt and under the law falls upon the person declaring that there is simulation in the nuptial sign.

b) *Proof of the* causae simulandi *or motives for exclusion*

The *explanatory, motivating and causal circumstances* of the excluding act of will may be many and varied, depending on the case (*see above*, no. 3, c). They comprise what are known as *causae simulandi*, taken most generically. Some circumstances motivate interest in nuptial appearances (*causa celebrandi* or also, more equivocally, *causa contrahendi*) and others, or even the same ones, explain the voluntary absence of any intention to be juridically bound (the *causa simulandi* strictly speaking or, more precisely, la *causa excludendi*). Indeed, as generic grounds for nullity and because it is subjective, the *caput nullitatis* admits countless types of *causae simulandi*.

From a practical point of view, provided that actual motives are not forcefully reconstructed to fit an *a priori* model, it is both in order and clarifying to prove what it is that explains the interest in celebrating the marriage with the appearance of effectiveness and what explains why the person internally wills the exclusion of marriage itself. In any case, we must remember that motivation is not exactly the same thing as the positive act of the simulating will. Therefore, to prove the causes of simulation (*celebrandi et excludendi*) one must prove that there is motivation in the person and not that there is exclusion. In addition to the impulse of motivation, the fact that there was a positive act of will to exclude is, strictly speaking, a presumption because, just as with a valid consent, the freedom of an act is in itself a mental reality that admits no direct and perceivable or face-to-face proof. The question then is whether the presumption that there is an act of exclusion is sufficiently strong to generate a moral certainty that can prevail over the force of the presumptions in favor of the nuptial sign in cc. 1101 § 1 and 1060.

The presumption becomes strong enough when, rather than being arbitrary and casual, it is *founded on proof* of *solid and serious* motivation that reflects the *constant lifestyle* of the simulator, that *precedes* or at least is *present* at the moment of marriage, and is of the *right proportion* to cause an exclusionary will. According to jurisprudential precedents, cases fell into this category when the following were proved: the exclusive intention to obtain carnal activity with a woman who would participate in such intimacy only within marriage; being in love with another person; legitimization of offspring; defense of honor and reputation; desire for wealth or social position; aversion to the other party; obtaining the state of marriage merely for a legal reason, etc. However, note that in all these examples of *causae simulandi*, in spite of them, or even because of them, none absolutely prevents the party from having decided to enter into a true marriage.

c) *Compatibility or contradiction between the contracting party's subjective ends and the objective ends of marriage*

For the purposes of identifying and proving an exclusionary will in a particular instance it is useful to examine the correlation between the subjective ends (*finis operantis*) pursued by the alleged simulator and the proper institutional ends of marriage (*finis operis*). Obviously, a valid marriage admits that a party may have private and particular ends as well as institutional ends when marrying. This situation is so frequent that it is possible to want marriage for a reason other than institutional reasons without thereby excluding marriage itself. But when the party's particular ends are in and of themselves incompatible with and contradictory to institutional ends and can be proved in the party's life, then a simulating will can be presumed. For example, if marriage is intended to be a camouflage for homosexual practices or if a party intends marriage to be the legal basis for obtaining a pension after a preplanned civil divorce. Simulation may also be presumed if in a particular case the party solely and exclusively desires these subjective ends, even though they are theoretically compatible with institutional ends, because strictly and logically they exclude any other end, including institutional ends. An example is when a party is driven *exclusively* to obtain riches, for in that case the marriage itself as an end is excluded. If when assessing a case we use the perspective of comparison between subjective and institutional ends, proof should be centered on the *incompatibility* between the ends or on the *exclusivity* of the particular ends.

d) *Objectives of the proof of the exclusive positive act*

As argued above, when discussing the structure of *intentio simulandi*, proof of total simulation should be directed at acquiring moral certitude about the *voluntariness* of the act, about the *objective falsification* of installing the principle of the juridical bond that is feigned by using words or equivalent signs in the marriage ceremony, and about the *supplanting nature* of the principle of the juridical bond contained in the

party's actual intention. As we saw, if there is supplantation, by the logic of the principle of contradiction, there is also necessarily exclusion.

e) *Forms of willingness and simple appearances. The so-called "hypothetical will"*

The first thing to be demonstrated about an excluding act is that it is a voluntary act. In themselves, ideas, opinions, beliefs and the conceptual elements of intellectual discourse are not acts of the will but acts and states of the mind and understanding. Neither are states of mind, desires, affections, sentiments, emotions and prejudices or inclinations which, at most, act as favorable or unfavorable impulses, but they are not acts of self-determination in the person who generates or assumes the action, insofar as the act is "the person's own." Even though the distinction is more difficult in real life than in theory, there must be no confusion between a positive act of the will and the movements with which a persons' will deliberates and weighs advantages before making a determination, as is the case with plans, for, as we all know, the best-laid plans do not necessarily result in voluntary acts.

The voluntary act (for an explanation, *see* commentary on cc. 1095 and 1096) must be current, or at least, virtual and not revoked. It need not be explicit, meaning that if it is implicit in other acts and manifestations by the person, it must be possible to prove. The inaptly named "interpretive will" is neither current will nor virtual will that has not been revoked; it is rather applicable to a decision a person would make after entering into marriage if it were possible to bring back the actual moment in the past when the marriage actually took place.

In valid consent, a person's will assumes into the act that person's entire future and commits it to marriage. Similarly, in a simulated act, it is also possible for the party to marry reserving in the act an essential aspect of marriage which, if excluded, would cause certain circumstances that are unknown because they are future: "I will divorce you if I stop loving you." In that context, the "hypothetical" will has been deemed to be a form of the willful exclusionary act. Regardless of the term used, confusion should be avoided between "hypothetical will" and states of doubt, perplexity or consideration of the possibility of various alternatives evoked by not knowing what future married life may hold. The different considerations evoked by not knowing the future and by concomitant fears are not per se acts of will. At most they may merely be impulses or motives for voluntary decision-making and in general do not generate a decision because of the very indetermination and uncertainty in finding a defined objective for a decision. In the expression "hypothetical will," what is really meant is that one can wish now for something to take place tomorrow, but subordinating the fulfillment of the voluntary decision that has been made to the occurrence of the future events not surely known today whether they actually will occur: "I don't know whether I'll get divorced some day. I don't 'want' to now, but at all events, getting married now, I am 'making

the decision' to marry while reserving the right to divorce if our life together is unhappy, if my spouse cannot have children or becomes mentally ill as happened to my mother-in-law," etc. To summarize: if it is desired that the marriage *start* dissoluble even though dissolving it is postponed to a future that is "hypothetical" at the time of the marriage, the desire positively excludes indissolubility of the bond.

f) *Forms of supplantation*

Supplantation and its excluding effect, which is a specific characteristic of *intentio simulandi*, have been described in doctrine and jurisprudence in various ways flavored by psychology and phenomenology. These approaches can be divided into four principal types.

The first type is the voluntary absence of *intentio contrahendi*. One or both of the parties know that they have never actually or virtually had the internal will to be united in marriage; the only thing they want is the external nuptial sign. Note that the party's will acts positively, but its sole and exclusive intent is the marriage ceremony alone. The absence of the true internal will to marry is voluntary. A merely formal will, the only will present, does not cause the bond to arise, but since it is the only will present, it implies not only the absence of the true will to marry but also the willfulness of the absence. Therefore, the will to have the nuptial sign exclusively is a positive act of will; it falsifies the sign and supplants the true intention to marry. Consequently, *voluntary supplantation of the intent to marry, without the need to have a positive intention not to marry*, necessarily and per se has *the effect of excluding the bond.*

The second type includes the positive presence of *intentio contrahendi non matrimonialis*. It is not unusual today for parties to present themselves at the marriage ceremony when for various reasons due to education and culture, such as the secularization of many societies, they have a mistaken idea of marriage that is incompatible with the essential parts of marriage as inscribed in nature by the Creator "in the beginning." But such a conception cannot be classified as ignorance, nor as an error of substance, nor as the determining factor of cc. 1096 and 1099. The parties have an idea of the canonical concept, although subjectively, when they celebrate the nuptial sign before the Church. They are limited to giving their consent as they perceive it, which objectively is wholly or essentially incompatible. In reality, there is a positive, express and direct act of will upon the party's own conception, and a subjective absence of direct and express will with regard to the parts of the canonical conception that are objectively incompatible with the party's conception. In those cases, *exclusion occurs indirectly, although necessarily and positively*, because the single positive act of will is not objectively totally or essentially matrimonial; and since it is the only act performed, it completely substitutes for what would be the true act, which is absent.

The third type is the *positive presence of intentio non contrahendi.* Actually or virtually through their will that has not been revoked, one or both parties intend immediately and directly to reject the other party, the marital bond, its essential properties, ends, or rights/duties. Instead of a desired absence of the will to marry, supplanted by merely the wish for the sign, which would be the immediate intention, or instead of merely the presence of an objectively false will to marry, now we have the express and direct exclusion of the essential elements of marriage as the immediate intention of the party's will. Thus the immediate and preponderant object of the positive act of will is *not to enter into a true marriage* (*intentio non contrahendi*); acceptance of the nuptial sign is merely a device required to satisfy motivation or obtain the subjective end that is sought.

The fourth group includes the positive presence of *intentio non se obligandi.* The intent of one or both of the parties now is not only and exclusively the mere external ceremony nor the express and immediate rejection of the other party or of the essential structure of marriage wholly or partly. Even more, the party may be sincerely convinced of wishing more than the mere formal ceremony, of not being against the marriage or the other spouse, and actively rejecting such ideas in the party's mind. In the third type, it is simply that the party rejects being obligated by a marital bond or by the juridical nature of the essential duties of marriage. What that person does not want is the obligatory or binding effect under law of the marriage he or she is entering and its conjugal duties.

Beyond these types of supplantation and their excluding effect, doctrine and jurisprudence hold that there is no simulation, at most only a *de facto* intent to abuse conjugal obligations throughout the marriage—obligations that, however, have been contracted. This attitude does not invalidate marriage, but it has traditionally been summed up in the expression *intentio non adimplendi.* It assumes a distinction between the right and the use of the right, for the right is given and received undiminished at marriage. It also assumes that abuse of the right is merely an unfortunate circumstance arising from the course of married life. Nevertheless, as stated above, this distinction is not justified within the marriage act, and if in consent a person reserves the right to be abusive—which is different from merely fearing or meaning to fail to comply with the obligations—then that person marries invalidly.

g) *Technical and legal investigation into the exclusion of the essential conjugal rights/duties*

Instead of the old distinction between *ius* and *usus iuris,* it would probably be more precise to prove the existence or exclusion of the properties that, because they are essential, are common to all rights/duties of marriage. All those rights and duties are mutual, permanent, continuing, exclusive and irrevocable.

They are *mutual* because both spouses have the same rights, and each spousal right is matched by the other spouse's correlative duty and each duty is matched by its corresponding right. They are *permanent* because they are rooted in the bond, which is perpetual; thus they cannot validly exist temporarily. They are *continuing* because they originate from a bond with a unifying force that never stops; thus if rights/duties were intermittent, the marriage would be null because in life the bond does not unite discontinuously or intermittently. They are *exclusive* because, like the bond, they can exist only between the spouses themselves. And they are *irrevocable* because, existing between the spouses, they do not depend upon revocation by the founding will. Since they are requirements in justice—right and duty—they thereby possess an intrinsic and extrinsic indissolubility that is beyond the will of the parties or of any other power.

Proof of the willful presence or exclusion of any of the essential characteristics and especially, assessment of the existence of rejection in whole or in part of the essential characteristics, allows for a much surer identification of whether the simulating party's intention affects *ius radicale* or *ius expeditum* in the terms previously used. Such proof and assessment of simulation can also be used more consistently with the role the legislator has attributed to the essential conjugal rights/duties in cc. 1095 and 1101 in the expression "matrimonii essentiale aliquod elementum," which includes them, as we have seen. This means that the voluntary rejection of any of the qualities or properties comprising the conjugal rights/duties that flow from the bond is a type of exclusion of the law itself (*ipsum ius, ius radicale*).

Indeed, there is exclusion when the mutual or reciprocal nature of the right/duties is rejected, e.g., if a party wishes to have the right to require the conjugal acts of the other spouse without being obligated in return. Another form of exclusion arises from rejecting the perpetual and continuing nature of the rights/duties. Perpetuity is excluded when the right/duty is attributed only temporarily, for since the marital bond is permanent, it is not possible for the spousal rights and duties arising from and supported by the bond to not also be permanent. Continuity is excluded when the party wants the right/duty to start, but to disappear after a time that suits the party, thus converting discontinuity into the essential or defining characteristic of the right/duty. Essential discontinuity is a fraud against the continuity with which married life is ordered in justice to its ends, and for that reason it is a form of exclusion.

From a practical point of view, it is sometimes difficult to determine whether temporary negation of conjugal acts responds to the well-known human capacity for failing to fulfill obligations truly acquired, or whether it shows that the party consciously and voluntarily is reserving his or her power over the conjugal debt out of a unilateral desire. Note that the various contraceptive methods or deviated sexual acts, as *facts or events*, do

not contain the indubitable key to differentiating between exclusion of the right or abuse in properly exercising the right. The key always lies in the *intention*. So the approach is to identify when intention excludes the right or when, in spite of the gravity of abuse and failure to fulfill obligations, we are confronted precisely with behavior that contradicts an obligation that nevertheless it was intended to assume as such at the time of the marriage.

It would be reasonable to believe that there is true exclusion if examination of the facts and antecedent, concomitant, and subsequent circumstances show the party's predominant will at the time of marriage concerning the conjugal acts that *per se* are apt to procreate was to *reserve them as a particular power belonging exclusively and solely to the party*—a power to be exercised only when the party is so disposed. Generally speaking, the symptom of exclusion of the right (*exclusio iuris*) during periods of discontinuing the conjugal act or its orientation toward begetting offspring can be seen in the conviction that intimate sexual access or parenthood is "the party's own business" that the spouse cannot demand, not even as spouse. It can be seen when the will to "agree to or deny the use of marriage" is a power that has never been conceded, but that it has always been wished to be kept or preserved as "one's own power or faculty." Experience has shown that in cases where the spouse, rather than agree to copulation apt in itself to the end of procreation, voluntarily prefer to encourage, consent to or tolerate incontinence, marital infidelity, or gravely deviated sexual practices and to accept the objective risk of rupturing life together. Then there is moral certainty that the right to the conjugal acts as the spouses' common good has been excluded. The basis of this moral certainty lies specifically in the inseparable conjunction of the spouses' good and the procreation and education of offspring.

h) *Proving exclusion*

Any morally lawful means of proof may be used, not only the methods expressly indicated in Book VII, but specifically, confession, testimony, documents and expert witness reports. Doctrine and jurisprudence deem the following to have special probatory value: confession of the simulator; simulation consistency throughout the person's life in the circumstances and indicators antecedent, concomitant and subsequent to the nuptials; and certain presumptions indicating a simulating will derived from jurisprudential precedents when making a common-sense assessment of frequently found life situations.

The best proof, by its very nature, is the simulator's own confession, which is a manifestation by the person who had the excluding will. The confession may have been made outside the process at an unsuspected time or may be made during the judicial process. Indeed, *if it is surrounded by factors attesting to its credibility* and since an act of will is an act of the mind that cannot in and of itself be perceived, then there is no better means of learning it than from the author's confession. That being the case, confession must be assessed (if extrajudicial) and used (if

the confession is made during the judicial process) with due preparation, caution and exhaustiveness, and without malicious prejudice or suspicion of falsehood, specifically because confession can show the internal mind of the person and the motivating circumstances for the person's decision. Still, although proof by confession is supreme because it is so close to the simulator, if it was not possible to obtain it, even by the person's denial, it is not required in order to reach the required moral certainty through a preponderance of other types of proof.

This leads us to the importance of always demonstrating that the person's life or the history of the facts altogether and in their natural temporal sequence is consistent with a will to simulate. Congruency can be shown by the consistent relationship between the periods of time preceding, concurrent with and posterior to the marriage act. Such manifestations and circumstances are considered to demonstrate that prior to the marriage there was a will to simulate. All simulation contains a negative and disintegrating form of the cause-and-effect relationship between consent and the marital bond that, in positive and constructive terms, is mirrored by the relationship between true consent and an effective marital bond. The causal relationship needs to take place in natural time in such a way that something occurring "afterwards" cannot cause an event that is "prior" in time. *Proof of antecedence or at least the simultaneous excluding by the will at the time of the marriage is required and is fundamental in the appreciation of the actual cause of simulation.*

The use of presumptions cannot be substituted because of the mental nature of the excluding act of the will, which must be recognized indirectly through life situations that theoretically can hint at what goes on inside a person. It is extremely imprudent to generalize from a specific life situation because of the equivocal value of isolated facts and events. For example, it is said that one who contracts marriage out of love could hardly have excluded the properties of marriage, or that in countries which do not have civil legislations influenced by a divorce mentality, the contracting party, who for his position (e.g., a magistrate), is specially obligated to comply to the laws, would hardly exclude the indissolubility of marriage. The reader will have noticed that in such situations, the party might well have wished quite the opposite of what would be presumed as "hardly possible." The purpose of these comments is not to cripple the use of presumptions, which cannot be substituted, but to point out that they are most valuable and probatory when they are not isolated facts but can be related to other situations, events and specific circumstances in a given case, when all together they make up a consistent manner of life that can prove the case.

These precautions are necessary when assessing the presumptions that indicate that the excluding intent was formalized as a pact and implies the will to radically exclude conjugal rights; that if exclusion of offspring was perpetual and not temporary, the simulating will is presumed

to have affected the right itself and not only an abuse in exercising it; that being educated as a Catholic implies the need to have a positive act excluding indissolubility, in contrast to non-Catholics "accustomed" to divorce; that if the party reads formulas favoring dissolubility into the marriage ceremony without other formulas reaffirming the will to do what the Church means by marriage, then the party is manifesting an excluding will; that in systems where a civil marriage is obligatory and divorce is allowed, it is very possible that a person who marries civilly and expressly manifests the possibility of divorce also excludes indissolubility when marrying canonically.

Finally, the interpreter should not forget—when extracting a presumption from a rotal decision and trying to apply it to a specific case which is different but with some similarities—that the presumptive force and its probatory use arose from those particular circumstances of that singular case in which the decision was applied. What in one case is reasonable to presume in one sense, in another case—even though similar—may hide an opposing intent. Therefore, the translation of a jurisprudential presumption from one case to another cannot be made automatically nor by using the presumption applied in another matter as a *categorical requirement* for nullity in the new case.

1102 **§ 1. Matrimonium sub condicione de futuro valide contrahi nequit.**

§ 2. Matrimonium sub condicione de praeterito vel de praesenti initum est validum vel non, prout id quod condicioni subest, exsistit vel non.

§ 3. Condicio autem, de qua in § 2, licite apponi nequit, nisi cum licentia Ordinarii loci scripto data.

§ 1. Marriage cannot be validly contracted subject to a condition concerning the future.

§ 2. Marriage entered into subject to a condition concerning the past or the present is valid or not, according as whatever is the basis of the condition exists or not.

§ 3. However, a condition as mentioned in § 2 may not lawfully be attached except with the written permission of the local ordinary.

SOURCES: §1: c. 1092, 1°—3°; *CA* 83
§2: c. 1092, 4°

CROSS REFERENCES: cc. 1055, 1057, 1059, 1066, 1097, 1099

COMMENTARY

Pedro-Juan Viladrich

1. *Conditional marriage: the scope of the factors*

This canon regulates the effects of conditional consent. In its most general meaning, a condition is any (*aliquid*) fact, event, circumstance or behavior that is in the future and uncertain or the existence of which, at least, is unknown, and which, if verified, is the will of either party or both to link to the effects of a consent given and consequently, to perfecting the marital bond. Giving a conditional consent can be understood only in relationship to an individual's process of conjugal selection (choosing a spouse and choosing to marry). It is a process that each party must experience before marrying. The factual scenario of conditional consent is not based on the absence or perversion of the true will to marry, which nevertheless appears to be given during the ceremony, as is the case with simulated consent (*see* commentary on c. 1101). In conditional consent there is a true will to marry, but the party has subjected his or her will to marry to the verification of an *aliquid* that although indispensable is uncertain

because it may exist in the future or may be unknown. Unless that *aliquid* really exists, the party does not intend to be married. The condition is a guarantee that, in spite of consenting, the party is assured of not being married unless the *aliquid* is proven to exist.

Underneath a conditional consent there lies *a biographical process and a kind of personal projection*, an essential part of which is something (*aliquid*) that if it exists, plants *doubts and uncertainty* in the party. In any of its forms, a condition amounts to a guarantee that the subject *decides* to include it in his or her consent as a safety device or as a form of self-protection. It is important to understand that this self-protection is a voluntary decision. That is why the apposition of a condition necessarily requires *a positive act of will*, which is included as part of marital consent. The purpose is not to modify marital content, but to *subject* the perfective effect of the bond to verification of the condition (*matrimonium sub condicione*). As we shall see, if, in spite of major drawbacks, the legislator admits a certain type of conditional consent as valid, it is because of the respect that *true* consent merits and, therefore, *the legitimacy of anyone's wishing to ensure certain aspects of his own personal life and marriage plans at the time of marrying and starting a family, given the uncertainty and doubt that caused the future or unknown "aliquid."* Keeping the individual's actual life background in mind is the key to doctrinal justification for admitting the validity of conditional consent and also especially justification for its limitations; and it is the key to understanding the signs of true conditional consent when assessing each individual case so as to distinguish it from similar situations.

2. *Classes of conditions*

Clearly there is a countless variety of subjective reasons and ends that a party may consider to be an essential *aliquid* for his or her marital consent and it may be uncertain about whether that something exists. It is equally clear that there are many types of "forms of conditions" that can be used to insure the various doubtful events, kinds of behavior or circumstances. Thus the scenario of true consent or apparently conditional consent is a motley one with regard to suppositions of fact, and a complex one with regard to adequate technical solutions. We must clarify this scenario as a preliminary conceptual step toward determining which cases of conditional consent are admitted as valid by c. 1102 and which are rejected as invalid.

a) A complete prototypical condition—called a *proper condition*—is one in which the party decides to subject the effects of his consent to the existence of a *future and uncertain event* ("if you get the government clerk position in the area where I live"; "if your family pays off all your outstanding debts," etc.). The typical effects are the following: giving

present marital consent, suspending the bond or making the beginning of its effect subject to future verification of the event, extrinsic transfer of completing the effects of the bond until the future and uncertain event occurs, making the effects retroactive to the time of the initial consent by means of a juridical fiction, and meanwhile, making the conditional consent revocable.

b) If the event is *not future or uncertain*, the condition is called an *improper condition*. Among future improper conditions there are *necessary* conditions and *impossible* conditions. Necessary conditions refer to events that although future, are not uncertain because they must be fulfilled ("if spring comes again"). Impossible conditions refer to events that although future, cannot be fulfilled ("if you regain your original arm," in the case of someone who was born without one or if it was amputated some time ago).

c) Of utmost practical importance are the so-called "improper" conditions of the *past* or *present*, because they are so frequent and because they are the only ones admitted as validly attachable to consent in c. 1102 § 2. They are conditions referring to events in the past or present that have already occurred, but whose existence is unknown or not yet verified with full certainty ("if you really possess the professional qualifications that you say you do," "if you have received an inheritance from your deceased parents," etc.). The essential difference between the effects of conditions concerning the past and the present in comparison with conditions concerning the future is that the event already objectively exists, although it may be unknown by or doubtful to the party placing the condition. There can be no revocability of consent in these cases because there is no objective suspension of the beginning of the marital bond. The bond has either been completely perfected or has never arisen. Lack of objective dependence and revocability notwithstanding, these conditions cause subjective suspension that, de facto, may be prolonged, and during that period may cause uncertainty between the parties about their status as spouses.

d) Regardless of whether a condition concerns the present, past or future, a distinction is usually made as to its *liciety*. An *unqualified illicit* condition refers to an event that is objectively immoral, although the reason for the indecorous or immoral behavior may not arise from direct contradiction with the values in the structural substance of marriage ("if you kill your mother," "if you obtain certain gains by defrauding your partner," etc.). A *qualified illicit* condition or an *antisubstance* condition is immoral because it directly contradicts the essential elements, properties and purposes of marriage ("if you agree to live with my lover," "if you avoid having children at all costs," etc.). Except for these objective sources of immorality, other conditions are *illicit* in principle, although they may be inappropriate or inadvisable. The reason we say *principally* is that *for a condition concerning the past or the present to be lawfully included, § 3 of c. 1102 requires both that it be intrinsically free of*

indecorous or immoral behavior and that it has the written permission of the local ordinary.

e) Because of the variety of conditional cases, it is also practical to keep in mind the following meanings. If the party's intention is to end the marital bond as soon as it is ascertained that the event has not been fulfilled, it is a *nullifying* condition (for example, "if we do not succeed in having any children"). It is a *suspensive* condition if the party's intention is to delay the beginning of the marital bond until the event is verified ("if you obtain the title of medical doctor"). It is an *explicit* condition if the wish to include it in one's consent was manifested overtly, clearly, specifically and determinedly; and it is an *implicit or tacit* condition if the will to include it, although not expressly formulated, may be inferred with moral certainty from certain facts or behavior of the party. As we indicated above, consent is conditioned by a positive act of will, although the act of will may be implicit.

f) Finally, the condition may be coincidental, mixed or freely placed concerning successive future behavior. A condition is *coincidental* when fulfillment of the event does not depend upon human free will ("if the drought ends"). It is *mixed* if the event depends partly on human free will and partly on chance ("if my sister marries and has children"). It is called *freely placed* if fulfillment depends upon the will of the other interested party ("if you finish your professional education"); and it is a *successively freely placed* condition if, in addition, fulfillment depends upon the other party's or even a third party's indefinitely continuing some voluntary behavior or activity ("if you stop drinking, gambling, taking drugs, keeping bachelor's hours"; "if your father continues to finance my business," etc.).

3. *Differences between conditions and other elements: cause, demonstration, mode, presupposition, and termination*

A conditional will must not be confused with other additions frequently attached to each individual's marital consent. Conceptually, the distinction between condition and cause, demonstration, mode, termination or presupposition is clear. In practice, however, there may be ambiguity. In case of doubt, the key lies in identifying the party's willed intention and giving preference to the words used to express it. It is a question of analyzing whether, beneath the various figures and forms of expression, there is or there is not a positive intention to *subject* the existence of the bond to any of them.

a) The *cause* or reason impelling the party to enter into marriage cannot in itself intend to be conditional, even though it may be the *causam dans* or principal reason for the marriage. There is a tendency to use the causal expression "because" instead of the conditional "if" (e.g., "I'm marrying you *because* I love you, *because* you are beautiful,

because you are honorable and hardworking" instead of "*if* you are a virgin, *if* you are rich," etc.). The *cause* or reason, however strong, belongs to the world of the dynamic mental attitudes that the party enjoys or suffers from, that move the party as a passive being. Thus the cause or reason is not yet the will—the act the party takes by himself and for himself as author and owner—but an object that is attractive to the party's will and that may be desired or rejected. The event that is the subject of the condition and the motivating force for the will must not be confused with the act of setting the condition. In principle, putting a condition in place implies an actual act of one's will. *It means including within consent, which is the will, a subjection of the intrinsic effect of consent to an extrinsic and uncertain cause.* And such a transfer of effect can only be done effectively through one's will. In addition, motivation as a psychological experience is perceived as the impulse *to wish to be married "now,"* specifically not to postpone marriage.

Motivation does not become the will by spontaneous generation. But a party may, if so desired (with his will), assume the reason or motivation as his own dynamic, and in that sense willingly become a part of it. Consequently, a party *may,* with his will, transform an initial motivation into a condition if, given the uncertainty or doubt about whether or not it exists, he makes a *positive decision* to make the marital bond depend upon its verification. But in that case, the motivation, including a reason that acts as *causam dans,* ceases to be a simple cause or reason for entering marriage and becomes a condition for the bond to exist. What is important here is to understand that the cause and the condition are in principle separate elements.

b) The same key to interpretation must be applied to the *demonstration* mode, referring to the individual characteristics of the other party ("I'm marrying you, *for* you are neat, pious, healthy," etc.) that are always a part of the process of choosing a spouse. These qualities are assumed to be real by the electing party and are held to be *real facts with accidental value*; but the party has not positively decided, when giving consent, to subject the existence of the marital bond to a verification of those facts.

c) It is also frequently desired to attach certain supplementary responsibilities to the foundation of a marriage. Technically, the responsibilities imposed and accepted under the marriage being entered into are called a *mode.* They are different from properly conjugal duties and purposes, although compatible with them because they are fulfilled after the marital bond is constituted (e.g., "I'm marrying you so you can look after my parents," "so that you and your sister can look after my business," "with an obligation to take up residence in a certain place or country," etc.). Because of their nature, these responsibilities are frequently covered in written or oral premarital agreements. And these responsibilities are also not truly conditions for the simple reason that the *mode* or responsibility is required only from someone already under the marital

bond. From that point of view their accidental nature can be seen, relative to a bond already established, which is the substance or support for the responsibilities.

With a condition, however, one wills to postpone the bond until the event is verified. Clearly, the positive act of the will of a party may transform a responsibility into a condition and want to subject the conjugal bond to a verification of the condition. But in that case it is no less evident that the *mode* has lost its nature as a mode. When a responsibility or mode goes directly against the substance of marriage, it must be considered as a practical way of positively excluding marriage and its essential elements, properties or ends; then it is subsumable under § 2 of c. 1101, which invalidates a marriage thus entered into.

d) Another type different from a condition is the case of a *prerequisite* or *assumption.* This concept describes a heterogeneous set of explicit and frequently implicit circumstances, qualities or requisites around which each party conceives the individual *purpose* of marrying ("I shall only marry when I find a man of my same education and financial circumstances," "I'll only marry a fertile woman," etc.). Obviously the prerequisite or assumption is merely a subjective prerequisite for accepting the celebration of a marriage, but it is not the consent that is given at the time of the celebration. As such a prerequisite, it is part of the genesis of the intention to marry and the acceptance of the marriage celebration as one's own specific project. So long as the prerequisite or assumption is not voluntarily changed into the content of the consent, by virtue of which the effect of the consent is subject to the event, verification or nonverification is irrelevant for the validity of the marriage.

e) On the other hand, the element usually called *term* or *date* requires a different treatment. This applies to a consent that includes the positive decision to limit the term of its effect by delaying the start of the bond until a particular date (*dies a quo)* or oppositely by setting a particular time for the bond to be extinguished (*dies ad quem*): "I'm marrying you effective such and such a date" or "I'm marrying you for five years." Because it is intended to be suspensive or extinctive, the term or date appears to be a suspensive or nullifying condition. But that is really not so, because term lacks the framework of uncertainty to which a condition subjects consent. The beginning or the end of the term is certain and previously fixed. For the case of consent that establishes a term for extinguishing the bond (*dies ad quem*), its intrinsic and undoubted invalidity does not derive from its nature as a nullifying condition, but rather from the initial *positive exclusion of indissolubility,* treated in § 2 of c. 1101. In the case of a consent that positively contains a *terminus a quo,* it is not possible to treat it as a condition concerning the past or the present for the evident reason is that in this type of conditional consent the existence of the bond is not objectively pending. In the *terminus a quo,* however, the consent given has no effect whatsoever until the preset date and,

rather than pending until a future and uncertain circumstance, there is a predetermined, preset *complete and total postponement.* It also appears that it is not possible to classify term as a *mode*, for a mode is a responsibility or charge only imposed on someone *already* linked by marriage, not on someone who postpones marriage. Therefore, a mode can only be incidental to an existing or present marital bond. There would be more reason to treat it as a condition concerning the future to the *terminus a quo*, since it appears a consent has been given, although with its effect suspended, and therefore consider the consent invalid.

However, even though it is unquestionable that in the present discipline regarding condition a consent subjected to a *terminus a quo* is invalid, it is our opinion that the most basic reason for invalidity lies not so much in its very reasonable equivalence to a condition concerning the future as in its nature of *excluding marriage itself* due to a total lack of presence in the object of the consent. Indeed, a *terminus a quo* does not give rise to a dependence upon an uncertain extrinsic cause, outside the party, but to a total and complete postponement until a date that, because it was determined and preset by the party himself, is kept within the sphere of what is *intrinsic* to the party's exclusive consent. Thus the presence of the object of the marriage—its natural and immediate effect—is excluded and is not transferred to any uncertain (because it is future) event separate from the party's will, and the party is the exclusive and intrinsic owner of the *terminus a quo*. What we have then is pure exclusion of the presence of the object of consent and consequently, a case of positive exclusion of marriage itself, to which § 2 of c. 1101 alludes.

4. *Structure of conditional intention and the anomaly of consent subjected to a condition*

The line of distinction is clearly fragile between the various types of conditions, between conditions and related concepts, and especially between conditions and others causes of invalidity—such as errors in quality and certain types of simulation. It is no easy task to overcome the problem of these slippery boundaries without specifying the individual and private conditional intention and its specific influence on causing the effect of consent to be abnormal. Consent subject to an authentic condition is, to start with, a real marital consent truly given, which at the same time causes the effect of the consent to be extrinsically dependent; by the will of the party, the effect of his consent is transferred to an event separate from his consent. Cracks, or in certain cases even a rupture, appear in the immediate causality between consent and the marital bond, between *in fieri* and *in facto esse*. In reality this *extrinsic dependency* of the effect is the root of all problems and certainly suggests a peculiar anomaly.

When the parties marry, theoretically they wish to be actually married. The Church also, through canonical formalities, assumes that by the consent the parties give, they are demonstrating their will *now* to become husband and wife and to be recognized as such immediately as a result of the consent given. In other words, consent is not the solemn manifestation of the "intention" to marry, but the act that immediately establishes the marital bond. Between *in fieri* (the act of marrying or cause) and *in facto esse* (the marital bond or effect) there is a causal relationship, but there is no break in the timeline; there is no gap during which the parties have given their consent but are not yet spouses. Only consent, because of its intrinsic effect, perfects the unique and definitive establishment of the marital bond. The effect *intrinsic* to consent and the *immediacy* between cause and effect, between consent and the marital bond, are essential characteristics of pure consent; there is no break in continuity, there is no extrinsic mediation between giving consent and the effect of giving consent.

On the other hand, consent subject to a condition causes a break in the causal continuity between the moment of giving consent and its full effect, which is suspended. Now, beneath the break in immediate causality there is the anomaly of a chronological gap between the "moment" of giving consent and the other "moment" when the bond arises, with all the risks derived from the fact that the bond is pending, from the juridical fiction designed to make its effect retroactive, and from the revocability of the initial consent. Actually, the much more fundamental anomaly produced, precisely by the party's will, is a transposition of the intrinsic and exclusive effective force of consent to an extrinsic cause—the uncertain event—to whose effective power of a pure consent becomes subject. The party so much wishes that the event be verified and it is so necessary for him that he prefers to *subject* nothing less than the effect of his consent to the condition. *This voluntary preference is the innermost element of a conditional intention* by the party to have the existence of the uncertain but indispensable event verified. The intention is so vital that it *takes precedence over* the effect of the consent itself. In psychological terms, the party imposing the condition makes a clear decision between either not achieving the event but at least becoming a spouse or not achieving the event but also not being married. Naturally the party chooses the latter.

Thus the anomalous effects typical of an authentic conditional consent are that after the consent is given but establishment of the marital bond is postponed, there may be a period for revoking the initial consent before the event is verified, thus reducing the effect of the bond to a mere expectation. A conditional consent implies accepting the possibility of an intrinsically revocable "valid" consent. In addition, when the condition concerns the future and the event is verified, the bond actually arises at that time, but for it not to contradict the validity of the initial conditioned consent it is necessary to have recourse to a *fictio iuris* to make its effects retroactive, and to unite the *in fieri* and the *in facto esse* marriage artificially. It is recognized that the transposition of effect to an extrinsic event,

the revocability of consent as at least a subjective possibility, the suspension of beginning the marital bond and the need for a juridical fiction to reunite cause and effect are anomalies difficult to reconcile with the principle of the exclusive causal effect of consent (cf. c. 1057 § 1) and the irrevocability of consent (cf. c. 1057 § 2). In addition, the subjective reservations, calculations and precautions of a person conditioning his consent in any way do not appear to reflect an attitude or disposition proper to the canonical and sacramental concept of marriage as an indissoluble community of life and love, which must be founded upon *pure* consent, that is, on a foundational alliance in which perpetual and exclusive conjugal giving and receiving should be *thoroughly* total, clear, full and irrevocable *in the act of entering marriage* (cf. cc. 1055, 1056 and 1057).

Therefore, the precautionary measures (even the reluctance) of doctrine and of the legislator to admit the validity of conditional consent are much justified, and so it is also very understandable the tortuous and irregular history of the changes of the discipline to which condition was subjected to in canonical matrimonial law. Piercing the heart of this history is an extraordinary paradox. Although the transposition of effect to an extrinsic event and the revocability introduced by a condition appear to collide head-on with the exclusive intrinsic effect and irrevocability of consent that is typical of the canonical concept of the consensual principle, this very principle of consensuality, in the form of respect for a party's true consent, has been the basis of resistance to the long canonical tradition of admitting the validity of a conditional consent. This tradition has only been broken in recent Eastern law. In the current Code for the Latin Church, the legislator has opted for a conditional discipline with the express purpose of reducing the anomalies of conditional consent as much as possible and saving a minimal amount of the tradition of respecting the principle of true consensuality between the parties. For those reasons, the conditional system in effect today should be interpreted in the light of background of doctrinal and legal precedents. To solve these problems, c. 1102 has been drawn up as a simplifying solution.

5. *Summary of possibilities and precedents in the discipline of conditions*

Theoretically, the legislator has three possibilities for conditional consent. The first is *to consider the condition as not placed* and therefore to deem the consent to be a pure and simple consent. Civil legislation on marriage has often taken that path. It is interesting to note here why civil legislators have preferred that choice. It is mainly because the causes reflect a mindset that differs from that of canonical marriage tradition. For civil lawmakers, marital consent is a contract in which the juridical certainty and safety of the formal manifestation is more important than

the inner will of the contracting parties. Furthermore, in case of a conflict deriving from the failure to fulfill the condition, it is always simpler and more practical to facilitate the severance of the marital bond than to try to demonstrate the innermost wishes of the two parties in a legal procedure. That is why the problems surrounding a conditional consent may be resolved outside the actual wishes of the parties by means of the juridical fiction of understanding a condition included in a consent to be nonexistent or not placed there for legal purposes. Clearly this option is not acceptable for a marriage in the canonical system, which respects the consensual principle. Ignoring the authentic will of the contracting parties to be married under a certain condition—considering this conditional consent, through the force of the law, as a pure and simple consent—would mean that the will of the canonical legislator substitutes the efficacy of the true consent of the contracting parties, thus creating *ope legis* a conjugal bond which in reality is not yet existent and with the possibility of never existing. In such case, it is radically contrary to the entire canonical tradition which has been ratified anew in c. 1057 § 1 which states that the efficient consent is exclusive to the spouses and no human power can substitute it.

The legislator's second option would be to understand this type of consent as totally contradictory to or at least seriously inadequate with respect to the nature of canonical marriage. The legislator could therefore decide *not to recognize the validity of marriages based on a conditional consent*, regardless of whether the condition is verified or not. Such a solution has the advantage of eliminating the anomaly of conditional consent from the marriage system, without the risk of claiming to substitute the will of the law in its place. This, however, implies ignoring an authentic will to marry when there is such a will, and punishes the private vicissitudes and mental struggles that impel the party with a just cause to include a condition more than it punishes the absence of a true will to marry. As we know, this was the solution unanimously approved by the Commission preparing the 1917 code, although finally, in an authoritative decision, it was preferred to retain canonical tradition in favor of true consent. It was decided to recognize the validity of conditions with detailed regulations that covered almost every possible case (cf. c. 1092 *CIC*/1917). Nevertheless, later, for conditions to be lawfully attached, the Instruction of the Congregation of Sacraments of June 29, 1949 required prior consultation with and permission of the local ordinary. In contrast, marriage law of the Eastern churches has moved in the direction of not recognizing a marriage subjected to a condition as valid. After the experience of c. 83 of the Motu propio *Crebrae allatae* of February 12, 1949, which in its prohibition against marrying under a condition—"matrimonium sub condicione contrahi nequit"—did not expressly state whether the prohibition affected validity or only licitly, the present c. 826 of the CCEO has neatly resolved the doubt by stating that "matrimonium sub condicione valide celebrari non potest," that is, a conditional consent is considered invalid in all cases.

Finally, the legislator's third possibility is *to recognize the validity of subjecting the effect of marital consent to the verification of a condition.* This option is based on respect for the long canonical tradition of recognizing the true will of the parties and on the consideration that with certain limitations, there is no basic incompatibility in natural law between a conditional marital consent and the nature of marriage; to state it more exactly it is between the intention to impose a condition and the intention to be truly married. Now, this solution favors conditions. However, in no way does it imply always and in every case recognizing conditions, accepting the validity of any event attached as a condition to consent by the unlimited arbitrariness of the parties, without reasonable justification. Thus, this third option can be described in relation to a broad criterion of recognizing different types of cases, as c. 1092 of *CIC*/1917 seemingly aimed at doing, or it may be described in relation to a more restrictive criterion that is above all consistent, with the present c. 1102.

The specific formulation of c. 1092 *CIC*/1917 was actually complex and in some cases confused because it was based on all three of the legislative options we have just examined. It stated, "A condition in place and not revoked: 1° If it refers to a future fact and is necessary, impossible or inappropriate, but not contrary to the substance of marriage, it must be held as not having been put in place; 2° If it refers to a future fact contrary to the substance of marriage, the condition makes the marriage invalid; 3° If it refers to a future event and is lawful, it suspends the effect of the marriage; 4° If it refers to a past or present fact, the marriage will be valid or invalid depending upon whether or not the subject of the condition exists."

These precedents, full of complex and unsatisfactory situations, explain the present legislator's decision. Without going to the extreme of invalidating all cases of consent subject to a condition, as is in Eastern law, the legislator is inclined towards a clearly restrictive and simpler solution that saves some of the ancient tradition favoring the true will of the party. The only types of condition admitted are validly attached conditions concerning the past or the present; no consent subject to a condition concerning the future is recognized as valid. Thus, the fundamental criterion behind the present discipline on condition is the following: regardless of the apparent type of condition or related form, if the true will of the party in giving consent is to cause the objective suspension of the marital bond, to link the bond to an extrinsic cause—the object of the condition—and consequently to allow the possibility of revoking the consent between marriage *in fieri* and *in facto esse*, then in such case, this type of consent is invalid and a marriage thus entered into is null. This criterion is the key to resolving doubtful cases: if there is evidence that the true will of the party positively contains the intention to suspend the marital bond as described above, that consent is always invalid, regardless of whether the event is fulfilled or not.

6. *The law in force for conditions concerning the future*

According to c. 1102 § 1, "Marriage cannot be validly contracted subject to a condition concerning the future." The text follows the earlier text of c. 83 of Motu propio *Crebrae allatae*, but it adds the adverb "validly" (*valide*) to dispel old doubts and classify any consent given as invalid, without exceptions, if it includes a positive intention to subject the beginning of the marital bond to a future event. With this clear and invalidating decision, the legislator wishes to achieve two principal effects. The first effect is to prevent even the smallest crack in the canonical system that might affect the principle of the irrevocability of an authentic marital consent under § 2 of c. 1057. It is most significant that the present text even eliminated the term "revoked" that appeared at the beginning of c. 1092 *CIC*/1917: "A condition in place and *not revoked*...." In the second effect, the legislator wishes to eliminate completely all the anomalies that are involved with accepting a state of dependence between giving consent and the rise of the marital bond. This is not only because of the possibility of revocation, but also because of the complex doctrinal problems and confused situations of fact arising from a possible consummation "*pendente condicione*," and also from changing the initially licit condition into a qualified illicit condition or into other impossible, necessary or improper types, etc.

In reality, two foundations are combined in the present text. There is the option based on positive law—an explicable and justified option, we may add—of not recognizing the validity of a condition concerning the future because of the confused and complex situations produced by this type of condition. Thus, the intention attached with a condition referring to a future event does not impede necessarily the existence of a true matrimonial will, since one who possesses a conditional intention does not simultaneously and necessarily have the intention to reserve the revocation of consent: the intention attached to a condition perfectly admits the intention to be bound to a verification of the future event, anticipating the acceptance of the future result of such verification, the subject would not have any intention to revoke the initial consent during the waiting period.

However, taking revocable consent not to be a true marital consent expresses a better knowledge of natural law on which it is based. Frequently a person who subjects his marriage to a future and uncertain event may at the same time harbor the intention *to reserve the right to revoke the conditional consent*, not in favor of a pure and simple consent but instead, of completely withdrawing his will to marry. The revocable consent (that includes such a reservation during the period of waiting that the condition concerning the future provides) is the consent that the legislator considers to be invalid under natural law, because the consent is not deemed to be true marital consent. Consequently, in a *fattispecie* whenever there is an intention to reserve revocation using any type of conditional form, we have an invalid consent, not so much because of the

conditional intent, but because of a *lack of true consent*; thus we have a case of exclusion according to c. 1101 § 1, expressed in an apparently conditional form.

Cases that do not contain a reservation to revoke but do include the suspensive intent proper to a condition concerning the future properly constitute the scope of § 1 of c. 1102. In relation to such cases, the categorically expressed legal text means that any condition concerning the future, regardless of the type of event, without exception nullifies the consent that is based on it. Thus in principle, if the event is future, it is irrelevant whether the condition be licit or illicit, necessary or impossible, casual or mixed. The proof must focus on demonstrating positive suspensive intent, at least implicit and virtual, not previously revoked, not even at the moment of entering into marriage; that is sufficient to invalidate consent regardless of the nature of the event and its verification.

However, as for necessary or impossible conditions concerning the future, the following precautions must be kept in mind. If the party who apparently included them knew they were objectively necessary or impossible and formulated them as a manner of expressing himself and had no serious intention of subordinating the bond to verification of the conditions, in that case, rather than legitimately taking them as not being placed, it can more appropriately be interpreted that in reality there is no condition concerning the future whatsoever and consequently, consent is valid because it is simple or pure. But if the party, in spite of the necessary or impossible nature of the conditions, wished to express a positive suspensive intention, then because of the subjective intent to seek a period of fulfillment, consent is invalidated.

7. *Laws in force for conditions concerning the past or the present*

Only conditions concerning the past or the present are considered in § 2 of c. 1102 to be included in consent. A marriage thus entered into can be valid or invalid depending upon whether or not the subject of the condition concerning the past or the present is verified, and it will be valid or invalid from the moment the conditional consent was given. "Matrimonium sub condicione de praeterito vel de praesenti initum est validum vel non, prout id quod condicioni subest, exsistit vel non." It is clear that the text does not limit the content of these conditions and thus any type of condition may be validly attached, including necessary, impossible and improper conditions, provided that they concern a past or present fact or event.

In contrast to the prohibition in § 1 against a valid marriage with an attached condition concerning the future, the admission of any type of condition concerning the past or the present is justified because, since the event has already occurred before entering into marriage, the condition

cannot cause objective suspension of the effect of consent. Because in objective reality there is no difference between the moment of the actual rise of the marital bond with respect to the moment of giving consent, *consent can never be in an objective state of waiting during which it could be revoked.* The event that is the object of a condition concerning the past or the present already exists objectively; it is only the party who is not subjectively certain or does not know of its verification (e.g., "if you have already done your military service," "if you are a legitimate child," "if it's true that you received your inheritance," "if you have never been married before," "if you have obtained your academic or professional degree," etc.). Therefore, during the period of "subjective uncertainty," the revocation of consent that a party may de facto claim *should be deemed as objectively ineffective and irrelevant as the intention to revoke a consent given in pure and simple form.* If, in spite of all, the party had a positive intention to reserve for himself during that period the possibility of revocation, then we would not truly have the conditional consent permitted under § 1 of c. 1102, but rather a reservation to dissolve the marriage covered in § 2 of c. 1101, which, however, was expressed with a certain appearance of an improper condition.

Concerning the validity of attaching indecent conditions regarding the past or the present, it is considered that when the immoral event had already happened, its attachment to the consent does not involve the matrimonial institution in the future occurrence of illicit acts. Therefore, such a condition is admissible.

To attach a valid condition concerning the past or the present, first there must be a positive act of the will intending to link the effect of consent to a sufficiently determined event; secondly, the condition must not have been revoked before or during the marriage act. The time to attach or revoke a condition is in any case before giving consent. The act of attaching or revoking a condition must be a positive act of the will because only the party with his will may stipulate that the effect of his marital consent is transposed to a cause extrinsic to consent, i.e., to the verified existence of an event. Thence the intention to attach a condition requires an authentic generation or "placement" of a positive act of the will, real or virtual, at least implicit. Revocation requires a similar act of the will, although its purpose is to unlink the marriage from verification of the event and to give a pure consent. Mere worry, desire, reasons for uncertainty, mere intentions, intuition or hope that an event will be confirmed by the effect of entering marriage, or other states of mind called habitual, presumed or interpretative will that do not in reality constitute a positive decision by the will are insufficient.

It is important to distinguish between imposing a condition on an engagement and on a marriage. It may happen that someone who has suffered from many doubts or uncertainties about something, often about the other party, during the prenuptial relationship, deems verification of the

conditions of existence as vital to continuing or breaking off the relationship. It would not be unusual to end up transforming the need to verify the *uncertain fact or characteristic into a condition, for the will to marry is* gradually formed throughout the prenuptial relationship, which is natural prerequisite oriented towards the act of entering into marriage. In such cases, it is important to determine whether the party with this type of condition wished only to link continuation of the engagement or the decision to proceed to marriage (and therefore, considers the condition satisfactorily fulfilled when he decides to continue the engagement or accepts the proposed wedding), or whether, on the other hand, the party has extended its link to include the act of entering into marriage, that is, to proper marital consent. In the first case, it is not marital consent that is conditioned, but the continuation of the engagement, or at the other extreme, acceptance of the wedding. Consequently a lack of verification or the falseness of the event would not necessarily affect the act of marrying, which would then include a pure and simple consent. It is common knowledge, however, that habitual and insufficiently satisfied doubts are a fertile environment for formulating true conditions. And that subjecting consent to a condition underlies a proceeding and sometimes tortuous and long journey of uncertainties that manifested themselves in various ways many times during the engagement, when attempts to verify the fact have proved to be insufficient or successive acquisitions of certainty were merely provisional. Consent is more likely to be authentically linked to a condition when it has been preceded by a series of doubts and uncertainties, temporarily and unsatisfactorily resolved, than when there is no history of uncertainty or doubt. The key to differentiating a merely prenuptial condition from an authentic conditioned consent lies in the *object* that the positive will of the party has been trying to link *by taking action*. The condition is authentic if the intention is *to subject the very existence of the marriage to an event*, even though it is formulated because of various uncertainties about continuing or breaking off the engagement. It is not a conditioned consent, however, if the object linked in the act was limited *solely and exclusively to the present continuation of the engagement or to the present acceptance of a future wedding, unless the act of marriage was also anticipated in these preliminary acts to be subject to the condition*. In order to be able to perceive and prove the difference, which may sometimes be subtle, it is necessary to examine minutely the significant acts and behavior of the two intentions in the particular prenuptial process of both parties. In the investigation, the party's own avowal, with clear signs of credibility, may be the most natural and decisive proof.

For a condition concerning the past or the present to be lawfully included in consent, § 3 of c. 1102 requires the written permission of the local ordinary. However, even in the simple area of liceity, this requirement again shows how restrictively present legislation accepts a condition concerning the past or the present. This procedure is doubtless the opportune time for the local ordinary, after hearing the parties, to be able to

purge the consent of trivial, imprudent or unjustified conditions, impossible, necessary and especially improper conditions, and also any intentions that appear in conditional form but are actually reservations for revoking consent or the indissolubility of the bond. In any case, the local ordinary should take proper care of the confidentiality that the party's privacy requires, in relation to outside parties and even with respect to the other party, whether dealing with licit and justified conditions or events of the opposite nature, if knowledge of them could cause unjust harm and prejudice. The text of the law requires that permission be written, thus, in addition to the obvious gravity of his instruction, demanding a well-founded basis for resolving the question. The parish priest or the qualified witness must not participate at a marriage ceremony if he is aware that the consent is conditioned and that the ordinary of the place where the marriage is to be celebrated has not given permission. But the ordinary cannot deny permission without just cause. In any case, a marriage celebrated under a condition concerning the past or the present without proper written permission is still valid. Written permission is especially important evidence for proving that a condition was attached to the consent by a positive act of the will. Even permission denied and a subsequent illicit celebration become particularly relevant in proving conditioned consent.

8. *A freely placed condition concerning successive future behavior or activity*

As indicated above in treating the types of conditions, successive free conditions may be described as being the permanent occurrence or nonoccurrence of certain behavior by the other party or by a third party, behavior that depends upon their free will ("if you never drink again," "if you never take drugs again," "if you change your bachelor ways," "if you give up gambling," "if your parents will make sure we don't starve," "if you continue to be the heir," etc.). That type of behavior or activity must continue indefinitely throughout married life. Although dependent upon the free will of the obligated party, its occurrence is not necessary but it is uncertain. For that reason, successive freely placed conditions are clearly conditions concerning the future. As long as *CIC*/1917 admitted the validity of subjecting consent to conditions concerning the future, there was no problem whatsoever in admitting successive freely placed conditions because their subject would be a future and uncertain event. The problems derived from the fact that successive freely placed behavior could always be unfulfilled at some time even after many years of satisfactory fulfillment or omission. Then the eventual contestation of the marital bond, proper to conditions concerning the future, was turned into something indefinite. Thus it caused an absurdity in that definitive verification of the event and the initiation of the marital bond could only occur after the death of the person obligated by the condition.

To avoid this kind of indefinite suspension, doctrine and jurisprudence both prepared a clever solution by turning successive freely placed conditions into conditions concerning the present by using the distinction, taken from the area of simulation, between the intention to be bound and the intention not to fulfill. It was interpreted that the object of successive freely placed conditions consisted of a serious promise, made prior to consent, to commit oneself to such behavior and that if after marriage there was *de facto* failure to fulfill, that would be irrelevant. If, on the other hand, the promise was not given seriously or if it contained an intention not to be bound, then the marriage was null from the beginning. Thus such a serious promise (with intention to be bound) made in the present definitively satisfied the object of the condition and at the same time, the absurd indefinite suspension of the bond disappeared.

In the new discipline, which flatly rejects the validity of a condition concerning the future, the problem of successive freely placed conditions is not only to resolve the indefinite suspension of the bond, but more basically, to resolve the future nature that the object of the condition may have *in the party's true intention*. The new discipline concerning conditions, therefore, precludes the use of a technical device—the assumption—to suppose that the subject of the freely placed condition as found in the true will of the parties is only to obtain a serious promise in the present. Today's *mens legislatoris* is against allowing a true condition concerning the future, which is categorically rejected in § 1 of c. 1102, to be admitted disguised as a condition concerning the present by means of that clever assumption about what the actually desired object is. Consequently the current solution for successive freely placed conditions withstands analysis and demonstrates a strict respect for the true will of the party without any prior assumption interpreting them as conditions concerning the present.

In summary, if, after examining the history that removes uncertainty about a behavior, such as personality, individual circumstances, the nature of the specific reasons to marry and have a family, the objective and especially the subjective importance the party gives to fulfillment by the obligated party, then we can have a basis for concluding that the object the party really wishes to ensure is *the behavior of the obligated person*. That object can only be satisfied through *permanent and effective fulfillment* ("I will marry only if you stop taking drugs or drinking forever, because under no condition do I wish to be the spouse of a drug addict or an alcoholic and if you have a relapse, I do not want to be obligated as your spouse"). In such a case the freely placed condition has a future and uncertain subject. This is a consent not recognized as valid by § 1 of the present c. 1102 and a marriage thus entered into is null and void.

However, after examining all relevant aspects of a particular case, even if it has conditional subjects identical to those mentioned ("if you stop drinking, taking drugs," etc.), we may have a different aspect of the

will. Now the party foresees a possibility of the obliged person actually failing to fulfill the condition. It is the same type of hypothesis as the possibility of fragility in matters of fidelity or the courage necessary to have offspring, frequent in any marriage celebration, but it is not an impediment to happily giving a valid consent. Now, it might happen that the hypothesis of a future failure to fulfill a condition is presumed in the mind of the party to be a manifestation, not desired, but certainly possible (even probable, given the history of lapses of the specific individual obligated to the condition), of human weakness and contradiction, but with the indispensable requirement that this person, after all is said and done, has at the moment of consent made a serious commitment to the intention to be bound and to be willing to try over and over again, if there was no de facto fulfillment. In such cases, what the party wishes, as happens with the marital obligation of fidelity, is *a serious present commitment by the other spouse to be bound to behave or not behave* in the manner causing uncertainty and giving rise to the conditional attitude; but failure to fulfill is assumed as possible if it is only de facto. If the party obtains this serious commitment from the obligated person, perfectly comparable to the present assumption of the essential obligations of marriage, then the party considers his uncertainty sufficiently satisfied that he in turn may give his own marital consent. If that is the true wish, a marriage thus entered into is perfectly covered by § 2 of c. 1102 and will be valid or not depending upon whether the promise or commitment of the obligated person, at the time of giving marital consent, was seriously made (with the intention to be bound) or not.

In any case, from the viewpoint of the qualification and of the procedural proof, the type of reaction of the contracting party, once married, is unveiled through the experience of the non-fulfillment of the object of the condition: the immediate rupture of common life (or at least near the discovery with a justified reason) is an indication of a conditioned consent, while the prolongation of common life without any cause after the non-verification of the event is contradictory to the initial existence of a conditioned consent. With regard to freely placed conditions, an immediate break favors proof that it was a condition concerning the future and sometimes indicates the solid possibility of a decisive intention rather than a suspensive intention. Maintaining cohabitation, especially if during that period and before the final rupture there were repeated failures to fulfill the condition, suggests a freely placed condition that could fall under a present condition seriously promised. Still, when the obligated party presents a history prior to the wedding of frequent lapses followed by "promises" and then from the very beginning of the marriage constantly lapses and fails to fulfill the condition, we have a strong possibility of lack of seriousness in the promise, that is, the lack of a true intention to be bound.

When the reason for such repeated failures, prior to and after the nuptials, is due to conduct that may generate habitual backsliding or psychic deterioration and strong psychosomatic dependence, then we have to consider the hypothesis that the person, although only obligated to a promise concerning the present, may be incapable of giving his word seriously for psychological reasons. Regardless of § 3 of c. 1095, that would imply that the marriage is null because there was no object of the condition concerning the present at the time of giving the conditioned consent according to § 2 of c. 1102. It is clear that the conduct that is the object of the promise is not the same as the essential rights and duties of marriage or the subject of marital consent. Since they are different, the levels of psychic capability for the two things cannot be confused, for there may be psychological or even circumstantial situations that clearly affect the behavior required for the condition as well as the capability of making a serious promise about it, even though it may be uncertain that those dysfunctions constitute inability to give marital consent (e.g., the habit of games of chance or compulsive gambling does not necessarily imply an incapacity for entering into marriage, but it may explain the lack of seriousness in the promise to break the habit).

9. *Particular quality that becomes a condition*

It is rather frequent for a party to believe that he has married under the condition that there is a certain characteristic or quality he believes the other party to possess at the time of entering the marriage. Such a case falls under conditions concerning the past or the present in § 2 of c. 1102. If, however, it is not a question of a prior particular quality (from the past or the present), but a quality that the obligated party must acquire in the future and if the condition was positively attached to consent, the case would fall under § 1 of c. 1102 and a marriage thus entered into would be null for attempting to make the bond pending.

The main question raised by these situations where it appears that a prior particular quality was required is to determine if we really have an authentic conditioned consent or whether, underneath the first impression that leads us to believe that it is caused by ambiguity in the manner of expression and the words used, there is not in reality some invalidating element, or whether it is simply a question of related elements or even a type of nullity not due to a condition. The primary source of irrelevant situations that appear to be conditional is the natural process of selecting a spouse. Generally speaking, physical identity and mere sexual difference, together with acceptance of the institution of marriage, are not the only elements governing the choice of a spouse (*see* commentary on cc. 1096 and 1097). No doubt, objectively speaking, those elements are essential, but from the subjective angle, a subjectively assessed quality or set of qualities of a very different nature are often added. If those qualities exist, the

person is desirable as a spouse, but if not, they cause indifference or rejection. It is not only frequent, but normal and natural, that these real or presumed qualities of the subjectively ideal candidate are the prime factor in making a choice. But, as already stated in the study of related types (*see above*, no. 3), the motivating cause is not merely a condition in the strict sense of the word, that is, wishing to positively subject the effect of the consent given to verification of the condition.

The second source of apparently conditional situations comes from the interplay between the qualities that were decisive in the spousal selection process and the defects causing deterioration in the spouses' life together and, in the end, the rupture of the marriage. The party may make sincere explanations both to himself and to others in the following terms: "I married him *because* I thought he was hard-working and kind but he's turned out to be lazy and violent and so I married under a *condition that has not been fulfilled.*" Frustration with respect to the qualities that subjectively motivate the choice of a spouse and that later play a role in the marital crisis generates doubtful situations that can be classified under different juridical types. These are the simply irrelevant motivating cause, mode, assumption, error, fraud and a true condition.

a) To assess a true conditional intent regarding a quality, in comparison with assessments that are subjectively important but that are not conditions, jurisprudence begins by requiring that the quality play a *major role* in the process of forming the will to marry. It is not reasonable to "elevate" a quality that had no special importance *during the period of spousal selection* to a situation to which the effect of consent is subject. After the prior importance of the quality is verified in relation to the subjective process of spousal selection, the quality may still be only a strong motivating reason. Hence doctrine and jurisprudence add that the party must also suffer from *doubt or uncertainty* about the existence of the quality that is so essential and so important. A party who is sure that the person of his choice has the quality in question is not going to be driven to protect himself through a positive and unexpressed act of the will that raises the existence of the quality—which he holds to be certain—to a condition that effects consent, because only risks and uncertainties can be insured. When the *fattispecie* presents doubt or uncertainty, evidence must be found of the *particular positive act of the will* that is required for there to be a condition and to subject consent to it. By definition, this particular act of the will is lacking in all situations that are simply motivational and in the other elements related to conditions. It suffices for the act of the will to be implicit and virtual, but in any case it must be positive. Thus a party who makes a condition is aware that the condition is willed, that is, that the condition is voluntarily attached, from the moment he puts it in place and from the manner in which he expresses it to himself and to others. Because of the essential willed quality of this act, the party is able to see the difference between something simply desirable and motivational

and something positively desired. The quality will have frequently been exteriorized through typical manifestations and behavior prior to, at the time of, and subsequent to the marriage. This is especially true before the marriage, in the manner of overcoming uncertainty by formulating the condition, and after the marriage, in the reaction to the first sign that the event is not verified. Due to the obvious similarity, proof about the positive nature of the act of the will must also be prepared in order to exclude certain cases (*see* commentary on c. 1101, no. 13).

It is reasonable to expect a person generating a positive act of the will for this purpose to be aware of imposing the condition, but that awareness is not to be confused with an awareness of the invalidity of a marriage thus entered into. Not knowing the consequences or juridical effects of the condition does not prevent one from wishing to subject his consent to an event or fact (cf. by analogy c. 1100). For the purposes of proof, however, when after the marriage the first signs of failure to fulfill the event appear, the fact that a natural spontaneous awareness that the marriage is invalid may signify conditional intent even if such awareness lacks precise technical shape (this is what becomes the correlated *a posteriori* of the consciousness of having a conditional will held *a priori* by the subject at the moment of contracting marriage).

b) Disappointment and frustration during *in facto esse* marriage with respect to a quality that was important and perhaps played a decisive role in the process of spousal selection is the basis for situations that the party may experience psychologically not only as seemingly unfulfilled conditions, but also as errors upon which consent was based or even as fraudulent deception by the other party ("If I had known, if I hadn't been mistaken, if I hadn't been deceived about this quality, I would not have married"). It is therefore important to point out the similarities and differences between a consent subject to a condition the object of which is a quality, an error about a quality directly and principally intended, and fraud (for errors concerning a quality and fraud, *see* commentaries on cc. 1097 and 1098).

First of all, we must point out that error and fraud do not arise from a positive act of will by the party; a condition, on the other hand, is always the result of a positive act of the will. Error and fraud come from the understanding and belong to the anomalies that the party's consent suffers from because his will is dependent upon a dose of understanding and interpretation. A condition arises directly from the will and belongs to the area of what the party, as the sole active source of his own decisions, decides to want. Consequently, to avoid confusion, the first element to take into consideration is that consent can only be truly conditioned as the effect of the party's free decision. The subject of the condition, the quality, is chosen by the party. If, on the other hand, the quality is merely the subject of a motivation, expectations and hopes, certainties or uncertainties, the duties imposed by the bond of marriage, reasons (intellective

discourse) for which the party considers it a good idea to marry, but there is no voluntary and independent (positive) decision to subject the effect of the act of marriage to verification of the quality (extrinsic cause), then said quality has not been made a condition and whether or not it exists is irrelevant, meaning that it does not invalidate the marriage.

Converting a quality into a condition is, therefore, a choice of free will. While any quality may be converted by an act of the will into a condition concerning the past or the present, the same is not the case with directly or principally intended error or fraud. For a nonexistent quality to flaw consent by error, it is not sufficient that it be just any quality of the other spouse, for *simple error in quality is irrelevant*. The party must wish it directly and principally, with preference over physical identity, which takes on a secondary and indirect value (with respect to the quality) in the internal structure of the subject of consent *(see* c. 1096 § 2). On the other hand, for a quality to be the subject of a condition it does not have to be directly and principally intended. It suffices that the party, with a free decision, wishes to subject the effect of his consent to the verification of the quality. To summarize:

— An error concerning a direct and principal quality is an *anomaly of understanding* the substantial subject of consent; *a quality is only that which has become the direct and principal substance of the consensual object.* This is not very frequent and is not automatically caused solely because of the objective or subjective "importance" of a particular quality. The quality is erroneously considered *certain.* Therefore, in the final analysis, *an error happens.* One does not knowingly and voluntarily choose to make the error. In such cases, the consent given is pure and unconditioned.

— *Conditioned consent is not an anomaly in what understanding brings to the will, but a free decision by the party* who wishes, through a positive act of his will, to protect himself by subjecting the effectiveness of his consent to a verification of a quality. This free decision to impose a condition is made *knowingly and voluntarily because the existence of the quality is perceived as uncertain or doubtful.* And finally, *the quality chosen as the object of the condition may be any quality.* It is not required to be objectively important and it need not be the essential subject of the consent. A condition does not affect the internal structure of the essential subject of consent, as a direct and principal error does. What the will to impose a condition influences is the effect of consent; the effect is voluntarily transferred to a cause extrinsic to consent, to the verification of the quality.

Fraud is also an anomaly in the correct contribution of the understanding to the will, even though caused by a third party, for if deceit causes no error in the victim, it does not fall under c. 1098. Let us look at the comparison with a conditional consent:

— For fraud, not just any freely chosen quality will suffice. To cause invalidity due to fraud the quality must be something that the victim holds to be certain as a result of deceit by a third party, perpetrated to obtain his consent and it must concern matters that can gravely disturb married life. Naturally, fraud includes the victim's *state of certainty* that the quality exists. Certainty is obtained (or restored, if there was uncertainty) as a result of deceit. The victim suffers unjustly—unknowingly and involuntarily—in his own intellectual decision-making process. Just as with error, what is affected here is the object of consent, and consequently the consent that is given is also pure.

— Differently, the quality converted into a condition is known and willed. It appears as a device for the party to protect himself against risk, doubt or uncertainty as to whether the quality exists; and the party's conditioning will is directed not at the object of consent but at the transfer of the effect of consent to the verification of the uncertain quality.

The cause of marriage nullity due to an error about a quality and to fraud is *the crisis of the object of consent* arising from a defect in substance in the case of a quality and from an unjust manipulation that alienates the party's consensual independence in the case of fraud. The cause of an invalid consent subject to a condition concerning a quality is not an anomaly of either understanding or of the will, but a consequence of the validity that the legislator grants to the sovereign act of the contracting party who wants to be a spouse only upon the verification of such quality.

1103 **Invalidum est matrimonium initum ob vim vel metum gravem ab extrinseco, etiam haud consulto incussum, a quo ut quis se liberet, eligere cogatur matrimonium.**

A marriage is invalid which was entered into by reason of force or of grave fear imposed from without, even if not purposely, from which the person has no escape other than by choosing marriage.

SOURCES: c. 1087

CROSS REFERENCES: cc. 125, 219, 1057, 1089, 1095, 1101

COMMENTARY

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1. *Defining factors: use of coercion to affect consent*

The subject of this canon is coerced consent. Following the centuries-old canonical tradition of protecting consensual freedom, the legislator does not admit the validity of a marriage entered into through force or fear due to physical or moral coercion by a third party in the consent of at least one of the parties. Here the term "consent," as a reality susceptible to coercion, includes four meanings. From the point of view of content, consent includes not only freedom to choose a spouse, but also freedom to choose marriage as a state of life. From the point of view of the temporal *iter* of consent, it includes not only the moment consent is given in the marriage act, but also prior experience during which the choice of a spouse and of marriage as a state of life are planted, strengthened and endured. Due freedom of the two parties requires exemption from coercion in all four aspects of consent. On the basis of the canonical tradition included in c. 1103, it can be stated as a general principle that a coerced consent is not deemed valid in the canonical matrimonial system.

This general principle notwithstanding, anyone can see that the particular facts and events in which the will of a third party may have been able to influence the parties' freedom of consent to a greater or lesser degree are extremely numerous and varied. At one extreme of the possibilities, a third party may go as far as to use physical force or moral coercion for the purpose of terrorizing a party to the point where the victim becomes a mere automaton during the process of choosing a spouse or choosing the state of marriage, or coercion may be intended to wrest external affirmative signs from the victim during the act of marriage. At the

other extreme, the influence of a third party may be minimal. Such would be the case, for example, of simple conversations, commonly held in families, in which opinions are expressed as to whether a candidate is desirable or whether marriage is appropriate. Given such varied scenarios, it is obvious that not every intervention by a third party designed to influence the complex consensual process can, without further investigation, be designated as the type of physical or moral coercion that invalidates consent. The intervention of a third party must effectively force the will of the particular parties and force it to a sufficient degree to harm their true freedom of consent. The nucleus of the question lies, therefore, in determining *the degree of coercion which vitiates the true freedom of consent.* The present c. 1103 does not stop at setting forth the general principle of the invalidity of a coerced consent. More to the point, *it establishes the requisites* that must be found in physical or moral coercion in each specific case before coercion can effectively be deemed *harmful to the measure of freedom due the parties.*

2. *The specific foundation for the nullity of coerced marriage*

It is common knowledge (*see* commentary on c. 1057) that one of the essential principles of canonical marriage law is the recognition and, consequently, the protection of the principle of consensuality. The marriage bond is established by an exclusive and individual power, which is the will of each party manifested as joint consent in the marriage act. This consent, which contains the perceptible union of both wills (cf. c. 1104), is *an act that belongs to* the parties. Saying that an act belongs to the parties means emphasizing that it is *a free and sovereign act* by means of which a human being by oneself and for oneself can make decisions about oneself. In matrimonial consent there is a reciprocal act in which each party gives oneself and accepts the other as a man or a woman capable of being joined. The sovereignty over this personal act extends and covers the initial process of the formation of the will to marry in each particular contracting party to the moment of the joint and unanimous manifestation of consent in the very act of contracting marriage. No other human has this power to marry and, in itself, no other power and will can substitute the exclusive sovereignty of the will of the contracting parties neither in its process of formation nor in its moment of manifestation. A form of replacement which is particularly obnoxious and opposed to the freedom and dignity of a person and of the sacrament of marriage is coercion of consent by a third party in this matter.

First, invalidation of a coerced consent protects the parties' act insofar as freedom of choice is required in both the choice of the person to marry and marriage as a state of life. This double freedom of choice, based on the sovereignty of the parties' consent, naturally results to the double

demand of being immune from coercion in choosing a spouse and in the choice of the state of marriage. Secondly, invalidity of a coerced consent precludes any attempt by a third party to make a valid and licit intervention in the establishment of someone else's marriage bond by substituting for and coercively infringing on the sovereign act that belongs to the parties. Permitting such an intervention would involve an essential and unacceptable breakdown of the principle "matrimonium facit partium consensus, qui nulla humana potestate suppleri valet" (c. 1057 § 1).

And so we arrive at the specific foundation of the invalidity of a coerced consent. The double freedom of choice and correlative double freedom from coercion constitute the essential content of *ius connubii* as *a fundamental human right and a fundamental right of the faithful,* as stated in c. 219. That canon and c. 1057 form the basis for the specific invalidity of a coerced consent in canonical marriage law. And in the correlation between c. 219 with cc. 1055 and 1057 we find the specific basis for the nullity of a consent given out of fear or force, and also the particular requirements established by c. 1103, which are different from the requirements provided in c. 125 for juridical acts in general. We may thus state with all force that since this is the sacrament of marriage, a coerced consent is invalid not only by divine law but also by natural and divine-positive law, for *ius connubii* is recognized in c. 219 as a fundamental right of the faithful. In any case, a coerced consent is null by natural law in regard to a nonsacramental marriage. Because the discipline on coerced consent is based on *ius connubii* as a human right, the CPI has shown consistency by interpreting the discipline on coerced consents in c. 1103 as applicable to marriages entered into between non-Catholics. On this basis, force and fear in marital consent as described in c. 1103 in contrast to c. 125 are always unjustly inflicted and the act of marrying under coercion is not rescindable, but null. To summarize, the *ius connubii* of c. 219 gives a foundation and specific requisites for the invalidity of a coerced consent, requisites that are more appropriate to the nature of marriage than the regulation provided for force or fear in the discipline of juridical acts in general, which are regulated in c. 125.

3. *Force ("vis")*

The literal text of c. 1103 has preferred to continue using the classic terms "force" (*vis*) and "fear" (*metus*) to classify the types of physical and moral coercion that invalidate consent: "Invalidum est matrimonium initum ob vim vel metum..." It is perhaps superfluous to remind ourselves that in canonical marriage law the terms *vis* "force" and *metus* "fear" have technical meanings that do not exactly correspond to their current colloquial use.

In its most classic interpretation, the term *vis* refers to doing violence through physical force by a third party on the free will of another party to the degree necessary to overcome his resistance for the purpose of taking over the express capacity with which the party's body externally manifests the intention to marry. Recourse to physical force is prototypical of the sphere of force (*vis*), because what the *incutiens* agent is pursuing is not so much to break down the inner spirit with physical mistreatment as it is directly to force the body of the party (*vis corpori illata*) in a physically irresistible way (*vis absoluta*) so that the organs of expression or external behavior of the party are subjected to domination (*vis compulsiva*) by the will of the agent. In summary, in *vis* or force, the direct object of coercion is the body of the party, his expressive organs, gestures or behavior, insofar as they are the means of externally communicating his intention. Through the use of irresistible physical force, the agent's will disempowers the party's command of his own executive capabilities and the expressive use of his own body.

The technical term *metus* or "fear" refers to all facts that have as a common denominator the use by a third party of any type of threat of certain harm directed straight at the inner spirit of the party, who then becomes distressed and upset (*vis animo illata*), and drives (*vis impulsiva*) the party to choose (*vis relativa*) between marriage as a means of escaping from those evils, or suffering them.

And so the dividing line between force (*vis*) and fear (*metus*) is not marked by the physical or moral nature of coercion; for that reason the difference between *vis* and *metus* is not the same as the distinction between physical coercion and moral coercion. Obviously, coercion or physical mistreatment is not always directed at forcing the bodily organs and gestures of the party to express the will of the forcing agent. Coercion or physical mistreatment may also be applied for the purpose of frightening the party so that because of anxiety and inner affliction, the party himself chooses marriage as the way to free oneself from such evils. And some types of moral coercion, not to mention certain psychological stratagems, may cause the party's external body behavior to become involuntary and subject to the will of the agent applying them. Consequently, the dividing line between *vis* and *metus* lies in the object and the effect. In *vis*, the party is physically separated from the ability *to use his own body expressively* (*vis compulsiva*); he has no choice between accepting or rejecting marriage. This means there is no consent (*vis absoluta*). In fear, the party is forced (*vis impulsiva*) to be the person choosing (*vis relativa*) between marriage as a way to escape the evils, and suffering the evils; thus in that choice there is a certain degree of consent, although flawed (*coacta voluntas, voluntas est*).

Doctrine and jurisprudence agree upon the difficulty that in practice today there are nuptial celebrations that take place under irresistible physical force on the party (e.g., requiring the head to be lowered as an

affirmative sign). It is assumed that if a qualified witness diligently observes the canonical precepts on premarital investigation, on the requirements for the manifestation of consent between the parties and the requirements of canonical form, there is no doubt that the witness will discover this type of physical pressure and will prevent such restriction to personal freedom and human dignity. Even though it is not very probable that such cases would occur, nevertheless, *vis* is no mere hypothesis, because the specific ways of using force found in historical precedents cannot be confused with *force* as *caput nullitatis*. In the modern world, force may appear dressed in new forms through the use of psychosomatic techniques that are at the heart of the area of nullity, to wit: a marriage entered into through absolute physical compulsion that separates the party from the power to use his own body expressively and that leaves no option but to manifest the will of the forcing agent. *Vis* requires the presence of a force imposed by an external agent that is a person. The physical nature of the force is not so important as its somatic objective. The force is directed towards operating upon the expressive and communicative powers of the party's body. It becomes an irresistible force (*vis compulsiva*) depending upon the psychosomatic condition of the person using it, of the party, and of the circumstances in which it is employed. In the final analysis, a force is "irresistible" when it achieves the surrender and somatic submission of the party, who is limited to expressing with his body the will of the *incutiens* with no possibility of resisting (*vis absoluta*).

These conceptual elements of force as a cause of nullity (*vis compulsiva, absoluta, corpori illata*) are what a canonist must take into account, especially in borderline cases. For example, he must consider these elements in cases in which the *patiens* has habitually been subjected to force and physical mistreatment from the time when the choice of marriage or choice of spouse was made, and during the entire consent-forming process or during important periods, and mistreatment has finally resulted in a state of submission and paralysis or automatic acts. The party arrives at the marriage ceremony in a state of total surrender, or at the very least, of grave decrease in any free ability to express himself, and he "consents" even though in the celebration there are no acts of force by the *incutiens*. In this type of case, in which the *patiens* "consents" in a kind of act (*consensus reflexe elicitus*) that "reflects" the prior condition of habitual physical exhaustion or weakness to which the *incutiens* has held him subject, we believe there is a foundation for deeming *vis* to be the cause for invalidity specifically because the party has had no other option (*vis absoluta*) except submission to the will of the *incutiens*, and the option was imposed in a physically irresistible manner (*vis compulsiva corpori illata*). If, on the other hand, it is the party who has chosen the spouse or the married state as a means of ridding himself of the *incutiens*' force, which he has physically resisted, although morally fearful and distressed, we would have a case that falls under the category of *metus*. Finally, if as a consequence of such chronic psychosomatic or physical

mistreatment (different forms of torture, injection of drugs by force) the party's mental health were affected, then, depending upon the nature and effects of decreased mental capacity, in addition to *vis*, the case could fall under the one of the types of incapacity listed in c. 1095 most appropriate to psychic harm.

The same criteria are recommended for classifying cases of panic or terror in which the party suffers from an inner fear to the point of having a psychosomatic block and objective loss of control over his own executive powers. Such cases would be classified as force, fear or consensual incapability. If the party reaches the point of suffering mental harm there from, the case may find a basis in consensual incapability as described in c. 1095. If there is no such mental harm caused, not even transitorily, but the executive and expressive psychosomatic powers have been subjected to the will of the forcing agent, the case will fall into the category of force. And if, in spite of everything, the party is the one who chose marriage as a means to avoid suffering from the evils, then, because there is a "coacta voluntas, sed voluntas," we refer to fear as a defect of consent. It will often happen that a particular case presents a mixture of aspects of these various types of nullity. It is prudent, in practice, to base classification firmly on the cause most susceptible to incontrovertible proof. In principle, a consent wrested from the party under such conditions is invalid at least by reason of fear.

4. *Fear ("metus")*

As we define the term "fear" to differentiate it from "force," *metus* is distress and anxiety in the party's mind (*mentis trepidatio*) caused by worrying about certain ills or evils threatened by a third party. To free himself of that threat, the party thinks he must marry (*vis impulsiva, relativa, animo illata*). In the *choice* of marriage that the *party himself* makes to free himself of the evils he foresees, there is a certain amount of will to marry, although it is forced through coercion. Therefore rather than being a total lack of consent, *metus* is a *defect* of consent.

In the structure of *metus* as a cause of invalidity, we should find and weigh four principle elements. First there is an *objective external act*, which is coercion by a third party upon the party to be married. Secondly there is a *subjective reaction of the party,* which is a state of fear and distress caused by the external agent's coercion. Thirdly, there is a *forced choice of marriage* made by the party, who perceives marriage as the means to enable him to avoid the evils that he fears. In this nonspontaneous, obligatory choice, the will involved in consent is defective. Finally, there are *nexus of causality* that link the other three elements. External objective coercion imposed by the inflictor must be the *cause* of the subjective reaction of anxiety in the party, and freeing himself of the evils

must be the *cause* of feeling forced into marriage. The current c. 1103 took only the essentials of the more complex requirements that the previous c. 1087 of *CIC*/1917 imposed for fear; the requirements of being unjustly instilled and of intention by the *inflicting* agent to obtain consent were eliminated. The current text is centered on the three great requirements of canonical tradition that reflect the minimum of natural law: fear must be grave, extrinsic and the cause of the marriage.

a) *Gravity:* "ob metum gravem"

The text of c. 1103 determines that to invalidate marriage, fear must be serious or grave. *Gravity* as used here is a juridical concept. An assessment of gravity results from weighing the objective importance of the evils derived from the *incutiens'* coercive action and the intensity of the subjective consternation and anxiety that afflicts the mind of the *patiens* facing such evils. There are then an *objective* and a *subjective* element in gravity. Both, however, need to be weighed, and rather than abstractly and generally, they need to be weighed in relationship to the specific inflictor and the party in their particular circumstances. Both elements are essential. The lack of the objective elements would mean that the fear was of purely inner origin, which would distance us from the structure of *metus* and, if there had been a powerful disturbance in the mind of the party without an external cause, it would take us closer to the cases of consensual incapability found in c. 1095. Thus the concept of gravity begins with determining that there was indeed an objective action on the part of the inflictor. After this factor has been examined, the second part of assessing gravity addresses the degree of subjective anxiety and distress in the party. The degree of gravity of the subjective factor is determined by the degree of perturbation in the party's mind—considered alone—and it must be sufficiently strong for the party to feel obliged to choose marriage to free himself of the evils he can foresee. Since this "flight to marriage" or "choice of marriage as an avenue of escape" is the party's inner experience and subjective solution, and since there must be objective coercion on the part of the *incutiens* that causes the distress, in the final analysis it is the assessment of the subjective situation of the *patiens*, that is, the weighted factor that *tips the balance* when interpreting the gravity of fear.

The classification of the gravity of *metus* is typical of juridical prudence and requires weighing together the importance of the coercive action, as the cause, and the strength of the subjective distress, as the effect, relative to the particulars of each case. The final diagnostic key is the provable certainty that the party's option to marry was forced by the causal nexus between the objective and the subjective elements. What we are trying to point out to the canonist with that final statement is that gravity of fear is intrinsically related to the extrinsic and unavoidable nature of *metus*, that these three requirements are interactive and that, in sum, they cannot be examined as watertight compartments but must be viewed as interconnected. The nexus that connects them is the *causal*

relationship between them: coercion by the inflicting agent must *cause* a reaction of fear and affliction in the party, whose mental anxiety in turn must *cause* the party unwillingly to face the forced option of enduring the evil or marrying. In sum, *fear can be a cause of invalidity when the party has suffered that causality in toto.* Therefore, *gravity of fear is the intimidating element of the coercion-distress relationship that can bring about causality in the party in toto.* Note that the hinge upon which these connections of causality turn or, in other words, the point of connection between the extrinsic, unavoidable and grave quality of *metus,* lies in the party's state of mind. That is why the legislator, doctrine and jurisprudence have been moving in the direction of deeming the specific and particular subjective element as the factor to be most heavily weighed, although not the only one, in a conclusion of *metus.*

An interpretation that takes into account this total and intercausal scenario of the requirements for fear benefits from the particular usefulness of a number of traditional contributions by doctrine and jurisprudence, whose purpose is to clarify and facilitate the assessment and proof of gravity.

Thus, to measure the element of the *incutiens'* coercive action (usually called the "objective" or "causative" element), a distinction is normally made between an evil that is *absolutely* grave and one that is *relatively* grave. An evil is absolutely grave when the threat usually succeeds in frightening a person not easily frightened (*vir constans*), e.g., death, mutilation, physical injury, slander, financial ruin, etc. An evil is relatively grave when the threat intimidates the specific party, taking into account age, sex, health, pusillanimous character or other particular qualities. In doctrine and jurisprudence a decision is incontestable when to determine the marriage null it is not necessary for the gravity of the evil to be absolute, but suffices that it be relative. This common opinion is not a result of relaxing the requirement that fear be grave. Strictly speaking, the distinction between absolute and relative does not point so much to gravity of fear—for both are equally grave for the purpose of the *metus* requirement—as to the fulcrum or nucleus of the process of proof. Indeed, evils considered to be *absolutely grave* are those the intimidating nature of which does not require proof, because this type of evil is readily admitted by the sociocultural context. What is decisive is to prove that the party has actually been threatened with evil by the inflictor, and if the threat is proved, the intimidating effect is presumed for anyone (*vir constans*). However, if the evil is considered relatively grave, first the threatening nature has to be proved in relation to the party's individual predisposition to distress. It is not sufficient to prove that the inflictor effectively threatened evil, because the sociocultural context does not consider it necessarily intimidating for everyone (*vir constans*). In doubtful cases it will be prudent to try to prove relative gravity; for example, changes in values from absolute to relative and vice versa, frequent in generational disputes;

changes in customs and sociocultural transformations, including when the changes affect the time of marriage relative to the time of the annulment process; a threat that implies the risk of unemployment in a place where there are no jobs or where there is a great deal of work to be had; variations in the sense of honor or the reputation of each person; the difficulties of being a single mother for a pregnant adolescent in countries with permissive or restrictive customs; and so forth.

One of the doctrinal and jurisprudential resources for measuring gravity of fear for the purposes of proof is to examine the *seriousness* of the threat. This means that in addition to weighing the absolutely or relatively grave intimidating element of the evil, it is also necessary to demonstrate the *effective credibility* of the specific threat from the point of view of the particular circumstances of both the party and the person making the threat. The *seriousness* of the threat, therefore, does not reflect so much the fact that the threat was made as it demonstrates that *it could credibly and practically be carried out.* An example would be that threats of physical harm proffered by a strong and healthy man who is habitually irascible and violent are *serious* because of his capability of carrying them out. If the party is an adolescent female, fragile of temperament and health, effective credibility is increased because of the particular attributes of the party. But, even though of an absolutely grave nature, threats of death to a young and healthy, strongly tempered man, made at a time of special disappointment by a sick old woman who all her life has enjoyed a peaceful nature, may be considered to lack true credibility and therefore, also cannot be taken seriously. Thus the specific temperamental qualities, life experience and context and circumstances of the threats that are discovered in the comparative examination of the agent and the party provide the information for weighing the concept of *seriousness* or the effective credibility of a threat.

To complete the interpretation of gravity, we have what doctrine and jurisprudence term *subiectiva existimatio*. It consists in the certainty of perception and intensity of persuasion with which the party subjectively sees danger. First, certainty in the party's eyes (*subiectiva existimatio*) means that the party must not only know of the threat, but must *perceive the danger or risk of evil that it contains for himself.* Clearly, if the intended party does not learn of the threat of an absolutely grave evil, or if after learning of it, does not see it as a danger, then, although it was made by someone capable of carrying it out, the threat can cause no inner intimidation. But once the perception of the threat is certain, the persuasion with which the party experiences danger as a risk and disturbance is a subjective assessment by the party. Within this framework of subjective assessment, we can fit the doctrinal and jurisprudential acceptance of what is known as *suspicio metus*, which is the belief, with an objective and certain foundation, that there is coercion. By virtue of this type of coercion, a party reflects on the significance of specific and unequivocal

behavior by a third party and ends up being persuaded that if he should reject a candidate or marriage, he would immediately suffer certain evils from the other party and consequently acts under coercion because of this realistic belief and resultant fear (*suspicio metus*).

So as to avoid extrapolating the meaning of *subiectiva existimatio* and *suspicio metus*, a canonist must remember that these figures are not subjective alternatives that can replace the *necessary objective quality basically required* for gravity of *metus*. These are subjective elements that become relevant in invalidating a marriage only insofar as they can be integrated into the objective picture of gravity; that is, to the degree that third-party coercion is sufficiently intimidating in the *fattispecie*, the threat is serious and realistically perceived. For, if underlying *suspicio metus* there is no objective and certain foundation based on the specific and unequivocal behavior of a third party, belief that it exists is an empty subjective conjecture without juridical relevance. In turn, when *subiectiva existimatio* is not related to a grave, serious and surely perceived threat, subjective belief loses all sense in the framework of *metus* and becomes a purely mental idea intrinsic to the party; and if the party's mentality is strongly disturbed, then we are close to the area of lack of sufficient inner freedom that is typical of certain mental diseases and therefore, close to the scenario painted in c. 1095.

b) *Cause external to the party:* "ob metum ab extrinseco, etiam haud consulto incussum"

To recognize the invalidating effect of fear, c. 1103 requires that it be freely instilled by an external agent different from the party. This requisite, usually called both by doctrine and jurisprudence alike "externality" or "extrinsic nature," contains an *essential nexus of causality* that is indispensable in this cause of nullity. It is the nexus between mental intimidation and an *external, human and free cause*. The extrinsic causal origin enables us to emphasize how the legislator, following canonical tradition, still conceives *metus* as intimidation that, although in the party's mind, is intimidation with respect to the danger of certain evils. The evils have an objective beginning and foundation, are neither inevitable nor necessary and are caused by the free will of a third party. The external and causal interference of intimidation, furthermore, enables a distinction to be made between the *metus* of certain irrelevant mental anxieties (fear derived from natural causes that are not free, for example from an earthquake, shipwreck or illness) and the lack of inner freedom or inner disturbances of a psychopathological nature, and various situations that fall under the category of "intrinsic fear" (the results of imagination, suggestion or remorse insofar as originating exclusively within the party). The external nature of interference by a threatening effect from a third party, *insofar as it is separate from the contracting party*, also clarifies the idea that there is in this *outside* interference an element that threatens freedom of consent and for that reason it contains a perverse principle that is always

unjust for sovereign self-determination in marital matters. For this reason, the requirement of unjustly instilled fear which was required in c. 1087 § 1 of *CIC*/1917 was eliminated in the present c. 1103. To summarize, *any threatening coercion which leads to marriage (because the party who suffers this situation wanted to liberate himself from such coercion) is harmful or, what amounts to the same, is unjust for the due freedom of consent.*

From a temporal point of view—considering consent as an *iter* or formative process—the requirement of externality means that the intimidating action must occur *before* the act of marriage. Evidently, a threat of evil made by a third party that may have taken place after the manifestation of consent (cf. c. 1104), for all that it disturbs peace of mind, would be completely irrelevant, for the marriage would not have been agreed to *out of* fear.

This priority of time raises a question of great practical relevance: the correlation between duration of coercion by the *incutiens* and duration of anxiety in the *patiens*. First of all, there must obviously have been a prior intimidating act. Now, once the threat is made and the consequent disturbance due to mental fear has been caused, the prior causality between coercion and disturbance that is required for *metus* demands not so much a reiteration of threats by the *incutiens* as persistence of inner anxiety in the *patiens*. It is not infrequent for a party to remain permanently intimidated as a consequence of a single threat that is not expressly reiterated but also not effectively revoked. Sometimes, depending upon the character of the inflictor and more so upon the character of the party, it is faster and easier to make a threat than to remedy the intimidating effect caused. What we are trying to indicate is that *for coercion to cease, a specific causal treatment is required*; revocation must be measured by the pacifying or alleviating effect produced and not by the *incutiens'* intention, but in the eyes of the *patiens*. In examining any particular case, therefore, it is important to distinguish carefully not only when the threat or coercive behavior of the *incutiens* ends, but especially when the party's disturbed state should be considered to have ended. In case of doubt, we believe that there are two keys to proceeding to assess the externality of *metus*: first, the existence and persistence of the disturbed state of mind of the victim; second, the need for the disturbance not to be intrinsic in the *patiens* but derived from a coercive threat by a third party at some prior time, even though the third party may subjectively consider that he later revoked it. Coercion will have ceased when the *incutiens* revokes it so expressly, unequivocally and adequately *for the particular circumstances and in the party's subjective assessment* that any later mental distress in the party, according to juridical prudence, can have no other cause but an intrinsic one. It ends, for example, when, after receiving express and ideal assurances from the former inflictor, the party

behaves habitually and spontaneously towards the inflictor in a manner consistent with peaceful, free and friendly relations.

Priority, in addition to providing temporal support, has a causal significance: the party's disturbed state of mind must be an effect caused by the inflictor's intimidating act. In other words, before the party is forced to cause marriage as a means of avoiding certain evils, he must be disturbed or intimidated. Doctrine and jurisprudence feel there is no question that an inner impulse to marry resulting from free deliberation on the advantages and disadvantages of marriage, resolved by the party in favor of marriage as a means to avoid the disadvantages or prejudice that a decision to remain celibate would cause, cannot be considered to be *ab extrinseco*, nor will a marriage thus entered into be considered invalid for reason of fear. Nor can any type of intervention by a third party be considered to be external coercion if it takes place during the deliberative process of the contracting party and has neither the nature nor the form of a threat of evil, such as, for example, advice.

It may be more difficult to classify the inner anxiety caused by remorse in the party or in cases of what is called "supernatural fear." The key to diagnosis logically lies in an external, human and free cause of the party's anxieties, a cause that is open to proof. Remorse, fear of sin, fear of negative consequences of a supernatural order, provided that they have no other origin than the inner world of the party himself, are irrelevant types of intrinsic fear for the effects of c. 1103. In cases of especially intense disturbance and affliction, some elements that fall under "supernatural fear" may come to affect the nature of the human act of consent and invalidate it, but those cases would fall under c. 1095 and never under c. 1103 because there is no external cause (for example, in certain degrees of pathological scruples). But if a third party should take advantage of the party's predisposition and should intervene by sowing nervousness, favoring it, increasing it, confirming it, in sum, acting upon the party with intimidating effect, then those elements contain the causal intervention of a third party in the party's anxiety, that is, a *causa ab extrinseco* and, to that degree, may result in invalidity of consent if the other two requirements of *metus* are met: gravity and unavoidability.

Doubts have been expressed and even contradictory solutions proposed about whether to accept a threat of suicide or a threat made by a mentally unstable person as a *causa ab extrinseco*. The question was due to the interpretation of suicide—and a fortiori of threats of suicide—as an evil that in itself threatens the life of the person contemplating suicide, but not others' lives. It was also due to considering the threats of a madman as irrelevant because they arise from a cause that is not free and voluntary, although it is external. But, evidently, a rigid and formalistic conception of the requirement of an external, human and free cause may lead to absurd interpretations. The basic meaning of *causa ab extrinseco* is that the party's anxious state of mind has its causal origin in a different person.

For example, a person threatening suicide is not only trying to take his own life but at the same time—or with his threat—may also cause a sense of guilt about his action, or countless other grievous consequences, in the minds of others, who may suffer from fear of evil as effectively intimidating coercion. If this should happen, it must be understood that the party's inner anxiety is not only intrinsic but also has a *causa ab extrinseco*. Cases of threats made by a mentally ill person must be treated in a similar manner. A marriage entered into under coercion imposed by a mentally ill person can never be considered valid for the sole and simple reason that the *metus incutiens* is not mentally fit. Case by case, it is necessary to look at the degree and nature of the inflictor's mental disturbance and at the possibility and likelihood of putting the threats into practice. An attempt must be made to verify the inflictor's effective capability of carrying out the threats, and the no less real possibility for a particular party to be intimidated by them. *Since the requirement of unjustly instilled fear has been eliminated, it would be illogical to require that fear be "sanely" instilled.* It is common knowledge that on occasion, precisely because of the type of mental disturbance and the inflictor's character, his threats may cause more fear, appear more threatening and more difficult to rationalize, to avoid or revoke—because of the pathology of his internal "logic"—than threats made by a sane person, and they may therefore cause increased intimidation in the mind of the party. When that happens, it seems totally reasonable in such cases to accept that there is an *ab extrinseco* causality.

The externality of *metus* also signifies that the *causa ab extrinseco* is a specific, identifiable and determinate cause. We are referring to both the inflictor and his coercive action. To put it another way, there is no *metus* if the specificity or determination of the intimidating threat or its external, human and free cause are so vague that it is impossible to identify them as the causal origin of the party's fears. Cases of intimidation, that has a vague but real external cause, fall on the borderline. For practical purposes, the most relevant are certain environmental contexts or situations in which the party habitually lives, which the party cannot avoid without taking extraordinary measures and which pressure the party into feeling intimidated by the evils that may befall him if he does not behave according to the patterns expected of him by said environmental context and by virtue of which he is socially approved, accepted and integrated or reproved and rejected.

In principle, it is to be hoped that any canonist, as an obvious point of departure, is able to accept that a part of the essential significance of c. 1103 lies in determining under which specific requirements fear is recognized as a cause of invalidity. In cases of a vague, external cause, such as environmental contexts or situations that the party declares he has experienced to the point of intimidating him, the essential point of departure on the norm of *metus* must be accepted. According to the norm, not every

situation or environment that causes invalidating fear can be simply construed as constituting a *causa ab extrinseco*, which, according to the text of c. 1103, is essential in order to move away from the irrelevant area of intrinsic fear. However, now that this first rule of interpretation has been put forth, it is also fair to recognize that, under certain requisites, environmental contexts or situations of coercion may act as genuine external, human and free causes of fear. In most of these borderline cases, the canonist's doubt does not arise so much from the lack of exteriority in the environmental context or situation with respect to the party as much as from the *vague* nature of the *human* and *free* cause, that is, from its aspect as an *anonymous cause*. And since an intimidating effect derived from the forces of nature, from natural and inevitable events, is irrelevant, an *anonymous* cause may not a fortiori be deemed, strictly speaking, to be a *free* and *human* cause of fear. But for that very reason, the *possibility of personifying* a coercive environmental context appears to us to be the second rule of interpretation to resolve these borderline cases. To be relevant for the purpose of *metus*, an oppressive context or environment must be a human creation and not the result of natural or anonymous forces. The intimidating or oppressive aspects (threatening nature) of the context or environment must be identifiable, determinable, open to concrete proof. Thus the purpose of the first effort in seeking evidence is to identify any intimidating aspects that can be seen in the context or environment. After the first objective in the process of proof is attained, it is important to remember that, to exist and to persist, a coercive social environment or context must embody and project a threat through the acts, gestures and behavior of certain persons. Those persons are the ones who in the end make and execute the threats of a collective environment. Without specific acts, the threat of an abstract environment, which cannot in reality make or carry out threats, would vanish.

Consequently, an oppressive collective environment intimidates through mediating agents. It often happens that those persons, in a specific action, do not threaten because the actions that intimidate the party are not carried out for an individual's purpose but as a representative of or under the aegis of the collective environment or context. In an individual case the canonist tries to see if, during the process of the party's making up his mind in a threatening context or environment, there have been *specific and objective* acts, behavior or gestures of one or more *specific* persons (external, human and free cause). Acts that even when they do not contain an actual personally proffered threat do at least for the party represent the *free and human means of perceiving or confirming that environmental coercion really exists*. Here is an example: "I personally have nothing against you; I even agree with you, not like what people think, but you know how it goes here and what will happen to you … if you don't get married and if it's not a Church wedding." To summarize: First, it must be demonstrated that the environmental situation or context is oppressive and, second, that there are specific and particular mediating agents of

collective coercion with respect to the individual's process of forming consent, such that through personified mediation, the context or atmosphere loses its nature as an anonymous cause of intimidation and may be deemed a free, human and external cause.

The expression "etiam haud consulto incussum" of c. 1103 alludes to the intention of the *incutiens* agent. It was introduced definitively to enable the admission of so-called *indirect fear*, which was not expressly recognized in the text of c. 1087 of *CIC*/1917, although following the interpretation proposed by Gasparri for that canon, rotal jurisprudence had already been admitting it.

According to the present text, fear caused *ab extrinseco* also includes fear caused in a party when the purpose of the *incutiens*' threats is not intentionally and directly aimed at causing the party to enter into marriage. In so-called *indirect* or *inconsultus fear*, it is the party who interprets that the threat is made to force him *specifically* into marriage and it does not have to have been the *incutiens*' express and direct intention when making the threat. Since it is irrelevant whether or not the external cause was a threat with the direct intention of forcing marriage, so long as there was a threat, it is also irrelevant whether or not the party is right or wrong in interpreting the marital purpose of the threat received provided that the party interpreted it as such and was forced to act because of it. Now that it has been established that the most important element is the party's subjective interpretation, it is not difficult to see that a psychological affliction suffered may be just as intimidating when, even though erroneously, the party interprets the threat to be so as when the threat is indeed intended to force marriage.

c) *The victim's unavoidable choice:* "a quo ut quis se liberet, eligere cogatur matrimonium"

The irrelevance of the fact that the external cause may inflict fear with or without the intent to force consent and the corresponding admission of indirect fear as extrinsic fear means that the victim party is the great articulator of the nexus of causality for *metus*. The requirement of *unavoidability* referred to in the last passage in c. 1103 is especially important. What is meant by the unavoidable nature of fear is that the power of fear and distress inflicted on the party causes a new and subsequent effect in his mind, namely the concept of an alternative forced upon him that is not free or spontaneous, of either suffering the evil or marrying; and an inner compulsion to choose marriage as a requirement to be free of the feared evils. Once the effect of the threat takes hold in the party's mind by a grave threat from a human, free and external cause, which is the first part of causality, it is again the party who establishes the second and defining part of causality. The party is the one who makes the assessment that he is obliged to marry to rid himself of the danger that threatens him and causes him to be fearful and the one who, for that reason, ends up giving his marital consent (*a quo ut quis se liberet, eligere cogatur*

matrimonium). Note that both the alternative that the party conceives and the choice of marriage are forced upon him. Doubtless they are acts of the party himself, but they are not sufficiently free acts. Thus it is said that in fear there is a certain degree of consent, but it is a flawed consent (*coacta voluntas, voluntas est, sed coacta*). Because marriage is unavoidable, the ultimate cause of the party's consent is fear (*metus causam dans*). The unavoidability requirement is an essential or vital part of invalidating fear because it represents the definitively causal nature of the fear endured.

The fact that the choice of marriage as a forced and liberating solution depends upon the party's subjective interpretation and not upon the interpretation of the inflictor, whose intention to wrest consent is no longer required by the present c. 1103, does not mean that the party's interpretation, because it is subjective, may be arbitrary, irrational, unrealistic or absurd. The subjective processes underlying the unavoidability of fear are causal and are applied by a capable individual who does not fall under c. 1095. Therefore, the subjective process by which the party is forced into the "marriage solution" needs to make some comprehensible sense—even though it may be in response to the party's subjective assessment or values that cannot be shared or that may not even be licit. This comprehensible meaning must make the genesis and culmination of the unavoidable causality of marriage to be objectively explicable, and always open to proof, at least proof by a confession. If within the party's inner estimation that fear is unavoidable there were only irrationality or absurdity, a *realistic* basis of the causal nexus could not be established. The basis is the perception and then the choice of marriage as the solution to the danger of evils—a choice made by an individual who is *consensually capable and psychologically normal*. And without a *realistic basis* for the unavoidable nexus, we would have the marriage of a psychologically disturbed person, covered under c. 1095, or a marriage perhaps entered into *with* fear (concomitant and irrelevant), but not *out of* fear.

However, from an absolute and objective point of view external to the party, it is not necessary for marriage to be the only way to avoid the evils feared. *It suffices that in the subjective opinion of the party that it be the most effective solution for getting rid of the evils feared among the morally and relatively possible solutions for that particular party.* However, and this is the deciding factor, the choice of marriage as the most effective solution for the party to free himself from the evil feared *must contain a causal process that, in spite of arising from the party, is neither irrational, unrealistic, arbitrary or absurd, but objectively and externally comprehensible, explicable and open to proof, at least proof by a confession.*

5. *So-called reverential fear*

a) Reverential fear is, in reality, a peculiar *fattispecie* or factual modality of ordinary fear. Precisely because it is not an autonomous cause of invalidity with respect to *vis* or *metus*, the legislator does not expressly include reverential fear in the text of c. 1103 and makes the same regular requirements for it. Nevertheless, since it is frequently found in practice, it enjoys general acceptance and detailed descriptions in doctrine and jurisprudence. The basic element is that the inflicting person is also the party's superior. Because of being subordinate, the party owes obedience and respect to the higher-ranked person. In that context, the gravity, externality and unavoidability of fear are specifically evaluated because of the particular coercive weight with which a threat made by a superior may intimidate an inferior and force him to enter into marriage as a means of avoiding the threat.

b) With respect to the external cause, it is above all necessary for the inflictor to hold an effective position of *superiority* that involves influence, authority or a certain real power over the party. This privileged position of the *incutiens* need not have any institutional or juridical basis, that is, it need not be *de iure*, as is the case, for example, in the relationship between parents and children because of parental powers, between guardian and ward, or between ranks of the military, labor or professional hierarchies. It suffices that there be a de facto effective nexus of superiority-inferiority, even though the relationship may be illicit, so long as it is not an occasional and escapable relationship, but sufficiently habitual, stable and inescapable to have a coercive effect upon the moment in life of the subordinate who is in the process of forming consent.

We must remember that a superior-subordinate relationship forms an environmental context or situation that may affect a person's life and is sometimes essential, such as in family or professional military life. These total, closed, and biographical aspects of a hierarchical context are a real, objective element that acts by adding a strong and broad intimidating effect to a threat made by a superior to a subordinate. Such intimidation may be apparently occasional and isolated, but it easily becomes a "permanently coercive environment." Once a threat is proffered, in context it may grow to be a permanent intimidating effect, to a certain degree independent of any reiteration or even revocation of the threat.

When the hierarchical context linking the inflictor to the victim continues, weighing a revocation can be of value only if it is an express revocation and if it ensures that the inferior may act freely and with impunity, but such a guarantee and assurance should be assessed according to the subjective view of the party. If, in spite of revocation by the superior, the party continues to feel intimidated living in the hierarchical context and in the end marries because he feels marriage is the only way to stop the

danger of the superior's anger, very probably we should conclude that this is a case of reverential fear.

c) For reverential fear, the degree of gravity has its own specifications. At the very least, an inferior's fear of causing grave anger (*gravis indignatio*) in the superior is sufficient to deem fear grave and invalidating. It is thus a matter of recognizing the specific afflictive effect of enduring an unfavorable change in the attitude and disposition of the superior, and of seeing it as an especially burdensome and significant threatening evil for the subordinate. We can imagine the intimidating effect of severe and surly parents who are always irritated when their wishes are not obeyed, upon a child in the family unit. We can interpret as *gravis indignatio* any state of anger or upset in a superior that is the result of having his wishes disobeyed, that affects the future situation of the inferior, that precludes the positive effects of the treatment usually received (e.g., confidence, friendliness, sympathy or protection). The positive effects are replaced by onerous and afflictive treatment on the part of the offended superior (e.g., silence and lack of communication, loss of favors, expectations unfulfilled, humiliating or degrading treatment, failure to protect or defend, or any type of marginalization, revenge or punishment, including legal action, which is available to the superior just because he is the superior). The fact that gravity is specific does not mean that there need be no objective basis and an equally grave subjective effect, as we shall see.

The particular "codes" used in each type of relationship between superior and inferior to express the nexus between superiority and reverence must also be taken into account. Indeed, the codes specific to paternal-filial relationships are not the same as the codes typical of the professional or working world or of a military hierarchy. Even within each context there will be different nuances that may be relevant; for example, there are families in which the father's intimidating authority is exercised without great verbal force, with a simple imperative gesture, whereas in other families the intimidating intent requires more explicit and forceful messages than a simple request, even one made persistently, insistently and inopportunely. Gestures, signs and words spoken lightly that in an environment of normal fear could not be described, not even relatively, as grave threats, in a context between a superior and an inferior may contain undoubted and sufficient gravity of intimidation. Consequently it will be decisive to determine whether the superior (external cause) has intimidated the inferior with the danger of his grave anger by using the usual meaningful codes in his relationship of superiority and respect. Seen from this perspective, the jurisprudential assumptions extracted from the experience of family codes, for example, serve as illustrations for other contexts, where we have the examples of insistent and inopportune requests, severity, scorn, silence, denying the inferior a chance to speak, assignment of responsibilities to the inferior because he dared to contradict the superior, who has lost his temper, etc. When the intimidating gravity of the

anger demonstrated by the superior is evaluated, suspected subjective situations of grave anger (*suspicio metus*) are particularly applicable to reverential fear, as is *subiectiva existimatio* on the part of the inferior.

However, the subordinate's "fear"—in reality a prudent attitude—of saying the wrong thing or not pleasing sufficiently, if it cannot be causally connected to the rise of an effective grave anger in the superior and to the consequences thereof, would be irrelevant because it is intrinsic. Equally irrelevant is a mere wish to be obsequious, to please or praise the superior if there is no threat or danger of grave anger from the superior. But threats by the superior which by their very nature exceed grave anger and are grave evils in any case regardless of the fact that the inflictor is a superior (e.g., the threat of death, physical harm, slander, disinheritance, etc.) constitute cases of *common fear*, not reverential fear, in which the addition of the superior position of the inflictor increases the elements of common gravity and unavoidability.

d) For the concept of reverential fear it is not sufficient to have a superior who has expressed grave anger at the risk of the party going against his will. It is essential that the party, as the inferior, feels that it matters, that it afflicts and disturbs him and that *he is afraid of angering his superior.* Only in such a case is the feared evil the *causal agent* of reverential fear. Classification of fear as reverential is not based simply on a hierarchical relationship, considered formally and abstractly (a superior and an inferior); it requires that *the link between superiority and reverential fear be effectively felt and experienced by the two persons involved.* Thus it makes complete sense, for example when there is a danger of losing the love and affection of the parents if they are not obeyed, that it is per se a *grave* evil for children, who feel the loss of these ties much more than other evils, such as the loss of material goods, a loss which per se could be deemed as a grave evil in regular fear (as opposed to reverential fear).

e) Since reverential fear requires no particular elements or different elements from those indicated in c. 1103 for regular or common fear, but requires only a specific weighing of the elements due to the nexus of superiority and reverential fear between the two persons, it is unquestionable that the elimination of the regular requirement of fear directly inflicted also favors reverential fear and makes it possible to assess it as invalidating when the superior does not proffer threats with the direct purpose of forcing matrimonial consent from the inferior.

f) On the other hand, as a sufficient minimum (the danger of causing grave anger in the superior), it is vital that the intimidating power of the superior's threats be based on elements derived from respect, dependence, subordination or reverential fear, actually experienced as such by the inferior. If not, there would be no way to explain the "reverential" origin of the unavoidable choice of marriage.

Consequently, regarding the unavoidable nature of the choice, because of a kind of anxiety and affliction that is due precisely to the situation of respect and reverential fear, the inferior and subordinate person feels obliged to choose marriage as the means of avoiding coercion *that affects only a subordinate* and that consists of enduring a superior who demonstrates his superiority with anger and irritation towards the inferior who is annoying him. If the party were not in a position of subordination, the same threat could not have caused the specific intimidation or the corresponding unavoidable choice of marriage to escape intimidation. Just as for common fear, for reverential fear it is again the party, now the subordinate or inferior, who subjectively expresses that his inner fears and unavoidable choice of marriage were caused by reverential fear.

6. *Some indications regarding the proof of fear*

Both doctrine and jurisprudence agree that three objectives must be met in order to prove fear: the external fact of grave coercion; the internal fact of grave fear; and the causal relationship between coercion, fear and giving marital consent. All methods of proof licit in law are valid for this purpose, especially the confession of the parties, testimonial and documentary proof, even expert testimony. In many cases, the coercive action of the inflictor may have been exercised so externally, manifestly and notoriously by a third party that proof can be direct. But fear or grave distress in the party is an internal phenomenon that strictly speaking admits of only indirect proof through the signs shown externally by the party outwardly expressing inner anxiety and the gravity thereof.

Similarly, the *causality* by which fear is suffered as the *effect* of coercion and which in turn *causes* the unavoidable choice of marriage is a *nexus expressed within the party* and therefore it is not possible to prove it by using direct evidence hence, the decisive importance of indirect proof, taken from assumptions and significant indicators, in causes of nullity due to *metus*. As examples we have behavior during the engagement period; any manifestation of affection between the two engaged persons; the codes of expression for objection or opposition to or rejection of the marriage by the party and by the specific family, social and work environment; reactions during and immediately after the wedding, especially during the honeymoon; and finally, the development of a loving and happy atmosphere and habits or, in contrast, a bitter, sad, aggressive or depressing married-life scenario; the way in which separation occurred; and the reasons for the delay in charging nullity.

Within the framework of these assumptions and indirect indications, aversion and lack of love must be weighed and proved. In jurisprudential tradition, the party's feeling of aversion towards marriage as an imposed way of life or aversion towards the other party whom he is forced to

accept, constitutes a presumption that consent was given through external coercion and fear, so grave as to overcome natural repugnance towards marriage or towards a candidate who was not freely chosen. Although aversion has great significance in the presumption of gravity and the inner causality of fear, it is not, however, a requirement imposed by c. 1103 for evaluating invalidating fear. Therefore if it is lacking or plays only a small role in any given case, neither does it prove the impossibility of invalidating fear. Similarly presumptive or indicative elements, depending upon the case, are proof of lack of love in a party who nevertheless enters marriage. Lack of love may be adduced as a significant indicator, together with other proof, if the earlier history of the party and the customs of the family and the social climate lend importance to marrying specifically for love; in other words, when it is otherwise inexplicable (without cause) and contradictory (inconsistent with his life and habits) that that specific person married with no love whatsoever for the other party, unless he felt coerced to do so.

An important presumptive value, which has analogies with aversion and reflects the expected effects on the personality and nature of someone obliged to live in a married condition who did not freely choose to do so, should be attributed to signs of sadness, bitterness and depression in general—not incompatible with episodes of aggressiveness. Equally important are psychosomatic illnesses that the party has had or is suffering from now, especially from the very beginning of and throughout married life, and when temperament or psychosomatic disturbances are contradictory and inexplicable in comparison with the usual personality, character and psychosomatic state before suffering from fear. In addition to proof by confession and by testimony, psychological and medical experts may contribute important support to prove the underlying basis of intimidation in temperamental and psychosomatic changes and subsequent situations of depression, aggression, anguish or anxiety. At the same time, the specific content of the essential duties and rights of marriage, referred to a specific case, produces a paradigmatic list of conjugal areas which needs to examine the devastating effects of that type of aversion, lack of love and temperamental and psychosomatic changes which have their specific origin in fear.

7. *Fear as cause of simulation*

As we have seen, fear suffered by a party does not always have the requisites indicated in c. 1103 to be a sufficient cause of the invalidity of marriage. However, this perturbation of mind can vitiate the process of the elaboration of consent in a different way, that is, it acts as an impulse or motivational cause of simulation on the part of the party.

In the kind of fear defined by this canon, as above mentioned, there exists marriage consent which lacks the sufficient free will to be valid. But when fear, as a mental perturbation, acts to cause simulation then there is no inner consent, even though there is a voluntary decision to celebrate the external sign of marriage. The person resolves to free himself of the threat that distresses him by *feigning marriage* because he understands that the appearance created by the nuptial celebration, although simulated within, is the best way to stop coercion. In such a case, instead of achieving the fearful victim's marital consent, coercion has achieved a pretense, the simulation that there is consent.

In these cases, efforts to classify them and to establish proof should be centered upon the positive act of exclusion according to the usual criteria of proof in simulation (*see* commentary on c. 1101, no. 13). And proof of the fear suffered, which acted as the *causa simulandi*, should in no way be configured to the requirements of c. 1103 (they are not required here), but to the requirements of the motivating causes of simulated consent. It is not a question of attempting to prove that fear was strong enough to deprive consent of sufficient will so much as proving that *fear was strong enough to motivate a positive act of will*: *feigning* marriage or *excluding* the marital bond, with its properties and ends, or the essential rights and duties that derive there from.

From a procedural point of view, since accepting and rejecting marriage are two contradictory attitudes, fear as an independent element and simulation should not be alleged *cumulatively*. Simulation should be proposed first, for it is a defect of consent; alternatively and subordinately, fear should be considered, for it nullifies only consent, although consent is assumed.

1104 **§ 1. Ad matrimonium valide contrahendum necesse est ut contrahentes sint praesentes una simul sive per se ipsi, sive per procuratorem.**

§ 2. Sponsi consensum matrimonialem verbis exprimant; si vero loqui non possunt, signis aequipollentibus.

§ 1. To contract marriage validly it is necessary that the contracting parties be present together, either personally or by proxy.

§ 2. The spouses are to express their matrimonial consent in words; if, however, they cannot speak, then by equivalent signs.

SOURCES: §1: c. 1088 §1; SCHO Resp., 18 maii 1949 (*AAS* 41 [1949] 427)
§2: c. 1088 §2

CROSS REFERENCES: cc. 1057, 1101, 1105, 1106

COMMENTARY

Pedro-Juan Viladrich

1. *Manifestation of consent between the contracting parties*

This canon regulates the requirements for manifesting matrimonial consent by the parties so that their consent can be admitted as valid. To summarize, the requirements are, first, that the parties be present in the same place at the same time in person or by means of a proxy to represent them (cf. c. 1105), and second, that they use a proper and unequivocal expression—words or equivalent signs—to externalize the joint intent that establishes the marriage intended by each party's inner act of will. Beneath these simple requirements, however, there throbs a phenomenon of extraordinary importance for understanding marriage *in fieri.*

A valid consent is a single act that has a complex structure. As an efficient cause, consent generates the marital bond only when its various components work together: the inner will of the parties, persons capable according to law, and legitimate manifestation (c. 1057 § 1). That obviously means that each component by itself has no effect. Except for the parties' being capable according to law (absence of impediments) and as concerns c. 1104, we should point out that considered individually and separately, without legitimate "joint" manifestation, the inner will of each party does not have any efficient force to create the marital bond and cannot be confused with what is called "naturally sufficient consent," so important for marriage to be valid. To put it in other words: manifestation of

consent by the parties is not a simple externalization of a consent that already exists, but the creation, in palpable terms, of consent as a consensual unity arising from the fusion of two separate and complementary inner wills. The fusion process—without which there would be no efficient cause because each will, separately and alone, is irrelevant—takes place during what is called "manifestation" of consent, which, strictly speaking, is its first, only and unrepeatable epiphany.

2. *Formalization of consent between the contracting parties and the concept of "naturally sufficient consent"*

The expression "legitimate manifestation" contains two different orders of formalization, which act successively. The first is essential and indispensable; it is the exclusive communication by the parties, in a single act, of each one's individual will to give and accept each other as spouses. The act of "joining in consensual unity" is a new element that is not found in the inner will of either individual party. Therefore, when the parties manifest to each other their intention to marry, there is first a "joint or conjugal" act—the creation of the unique and unrepeatable consent or marriage *in fieri*. The act is exclusive to the parties, in a positive sense, because they are the only ones who can make the joint consensual communication and, in a negative sense, because no human power may supply this act that is proper to the two parties. It is an *ab extrinseco* communication of two different and still separate acts of inner will that become "matrimonial consent." This single consent is the result of transforming two individual wills into one that establishes or institutes marriage and it is called "naturally sufficient consent."

3. *Consensual unity of marriage* "in fieri"

The presence of both parties in person or by proxy, at the same time and in the same place, and the use of words or equivalent signs if words are not possible, are the formal elements—person and his words—that best express the marital reality being established. The purpose of the formal elements is to emphasize that the unique marital bond is not caused by "two wills" that are merely exchanged, with each "contracting party" remaining subjectively independent as before. Instead, consent is seen as a single act that establishes the conjugal unity. When formed, consent is a "conjunction" or joining of the persons of the man and the woman in creating "one will." The will of the "one we" is the patrimony of both parties in a sense that is deeper and more conjugal than each of their two wills that created one by their fusion. This means that the consensual nature of the parties' giving and accepting each other as spouses is not the same as

the mere structure of a contract. In the canonical concept, marital consent is not an exchange, for mutual benefit, of separate elements outside the parties, by two wills that retain their duality. In the joining of two persons in marriage, giving and accepting are the giving and acceptance of each other; that is why no one but they with their wills can give themselves to each other and accept each other. Obviously, a consensual origin is required for giving and accepting each other. But consent, as a joint communication between the parties' wills, with regard to the sexual complementarity of their bodies, is something deeper. From the first moment, consent is the *manifestation*, the *in fieri*, of the *two becoming one*. The purpose, which is present in the nature of consent, is to become a new type of being in marital community as a state of life or in co-identical lives—*una caro* (one flesh). The new type of configuration makes an existential reality of the maximum union possible within the complementarity of man and woman: a union of persons by uniting their sexualized natures. The union is not only spiritual, but includes the different and complementary sexual modes of their bodies. And this sexual complementarity demands a corporeal, visible and perceivable expression. The requirement of *visible conjunction* is precisely the essential heart of the phenomenon of *manifesting* consent as a *joint communication* between the spouses *in fieri*. In that sense, consent is the first "epiphany" of the new way of being; it is the *manifestation that establishes* the new way of being. And in explaining its nature and effect, we find that consent or marriage *in fieri* is much broader than the juridical figure of a contract. Consent is a consensus, but not a contract.

The two parties manifesting their wills in joint communication constitutes "the first marital consensus." Since it is manifested as a single joint consensus arising from an initial duality of their inner wills, it is, as an externalized act, a recognizable consent whose nature is to establish the bond, first between the parties and then, as a consequence, in the eyes of the Church.

4. *Distinction between formalization of consent between the spouses and the form of public recognition by the Church*

The other level of formalizing "legitimate manifestation" is the level where the qualified witness and the two ordinary witnesses act. But it is at this second formal level (cf. c. 1108 § 2) that the parties are asked to manifest their consent to each other; that is the first formal level, which is for the parties only, and their consent is received in the name of the Church. The joining of two wills into one is not the work of the qualified witness when asking for the manifestation. Strictly speaking, it is exclusively the work of the parties, and they formalize it by expressing their consent to each other. As a naturally sufficient joint consensus, their consent is

presented through the qualified witness to the public and to the ecclesial community for recognition. Through acceptance in the name of the ecclesial community, the Church recognizes the consent made to each other by the parties as a marriage that is valid in the public social order of the people of God (cf. c. 226). This second level of formalization is usually called "canonical form"; but it does not constitute a "naturally sufficient consent," which no human power can supply, but *an act recognizing that the consent exists publicly in the ecclesial community.* For that reason the specific form of public acceptance and recognition may be given or provided in what is called "extraordinary form," without losing public acceptance and recognition. Finally, this public form of acceptance could never operate without consent having been previously formalized at the first level.

5. *The legislator's purpose and requirements*

With regard to the requirements stated in § 1, for the manifestation of consent to be valid, the legislator requires that the *parties be present in the same place and at the same time, either in person or by a proxy* who represents them with a special mandate for that time and place. Therefore, we must consider the following forms to be ineffective manifestations: letter, messenger, telephone, radio, audiovisual tape, fax, electronic transmission or any other long-distance means of communication in which the strictly direct and simultaneous personal presence of the parties is substituted or replaced by any type of support other than their direct words. Express personal representation by a proxy is not to be confused with the nonspecific intervention of just any third party or messenger, which is invalid. We must also consider to be null and void any manifestation of individual wills made by parties in different places or at different times without their being together to act together. The requirements of personal presence (or by express and special proxy) and of a joint act in time and place affect validity, although under positive law, and these requirements are also binding upon baptized non-Catholics, including those exempt from canonical form, for these elements are inherent in the expression of consent as a joint and marriage-establishing act.[1]

As for the provisions in § 2 of this canon, we must make a distinction between validity and liciety. In the strict sense, for a manifestation of consent to be valid it is sufficient that it be jointly made by the parties with *the unequivocal external signs that indicate they wish to marry one another.* Specifically, a valid sign is one that can, according to the parties' own cultural code, unequivocally express that both have an affirmative will and what they will is marriage and not something else. For liceity, the

1. Cf. SCHO, Resp., May 18, 1949, in *AAS* 41 (1949), p. 427.

parties must give consent in *their own words* orally expressed. It is not licit for them to have recourse to other equivalent signs unless a party, for any reasonable cause, cannot speak. This norm is also binding on parties who do not know the language of the qualified witness and vice versa; in such a case an interpreter is used (cf. c. 1106). Finally, since in relation to c. 1057 this canon requires legitimate manifestation for consent to have effect, *silence can never be considered to be the equivalent*, for it is neither an external nor perceivable sign of the unequivocal inner will to marry. Because it is not an unequivocal sign, if either party or both are silent there is no legitimate or valid manifestation of their consent.

1105 **§ 1. Ad matrimonium per procuratorem valide ineundum requiritur:**

1° ut adsit mandatum speciale ad contrahendum cum certa persona;

2° ut procurator ab ipso mandante designetur, et munere suo per se ipse fungatur.

§ 2. Mandatum, ut valeat, subscribendum est a mandante et praeterea a parocho vel Ordinario loci in quo mandatum datur, aut a sacerdote ab alterutro delegato, aut a duobus saltem testibus; aut confici debet per documentum ad normam iuris civilis authenticum.

§ 3. Si mandans scribere nequeat, id in ipso mandato adnotetur et alius testis addatur qui scripturam ipse quoque subsignet; secus mandatum irritum est.

§ 4. Si mandans, antequam procurator eius nomine contrahat, mandatum revocaverit aut in amentiam inciderit, invalidum est matrimonium, licet sive procurator sive altera pars contrahens haec ignoraverit.

§ 1. For a marriage by proxy to be valid, it is required:

1° that there be a special mandate to contract with a specific person;

2° that the proxy be designated by the mandator and personally discharge this function.

§ 2. For the mandate to be valid, it is to be signed by the mandator, and also by the parish priest or local ordinary of the place in which the mandate is given or by a priest delegated by either of them or by at least two witnesses, or it is to be drawn up in a document which is authentic according to the civil law.

§ 3. If the mandator cannot write, this is to be recorded in the mandate and another witness added who is to sign the document; otherwise, the mandate is invalid.

§ 4. If the mandator revokes the mandate, or becomes insane, before the proxy contracts in his or her name, the marriage is invalid, even though the proxy or the other contracting party is unaware of the fact.

SOURCES: §1, 1°: c. 1089 §1, 4°; CodCom Resp., 31 maii 1948 (*AAS* 40 [1948] 302)
§2: c. 1089 §1; SCDS Litt. circ., 1 maii 1932; SCDS Litt. circ., 10 sep. 1941
§3: c. 1089 §2
§4: c. 1089 §3

CROSS REFERENCES: cc. 1057, 1071, 1104

COMMENTARY

Pedro-Juan Viladrich

1. *Defining factors*

For the manifestation of consent to be valid, both parties must be present in person at the same time and in the same place (*see* commentary on c. 1104). There may, however, be various circumstances that prevent the parties, in spite of their nuptial plans, from meeting in person at the same time and place to give their consent according to the requirements of c. 1104. In those circumstances, for plausible pastoral reasons the legislator recognizes the right of either party or both to give their consent through a proxy who represents them at the marriage ceremony. But since manifestation of consent is a very personal act, in c. 1105 the legislator gives the minimum requirements for validity that must be met by the party giving the power, by the mandate or special power to represent the party, and by the proxy or person with the power. Any intervention by a representative or agent without all those requirements is considered null and void.

2. *Requirements to be met by the mandating party*

First, under § 1, only the party to be represented may designate his proxy and give him the specific mandate to give marital consent in his or her name. Under pain of nullity, no third party may substitute for the party in designating a proxy and granting the power. The contracting party is also the only one who can and should, for validity, designate the name of the specific person whom he wishes to marry. Naturally, it is not the proxy but the mandator, the principal, as the true and particular contracting party, who must meet the requirements of juridical capacity and qualifications (absence of impediments and consensual capacity) necessary to enter into marriage. Given that the purpose is to enter into marriage, the proxy need not be of the legal age required for a general power of attorney; he need only be of canonical age for marriage.

3. *Requirements to be met by the designated proxy*

The legislator does not establish a specific list of qualifications to serve as proxy. Far from being an omission, the silence should be seen as a demonstration of the intent to facilitate as far as possible the capacity to serve as proxy. With regard to the validity of the power, although § 2

admits that a formal power recognized under civil law as a public document is effective, that does not mean that the canonical qualifications to be designated as proxy for giving marital consent are those required by civil laws. We should also remember that the consent that establishes the marital bond is consent of the mandator, because he is the real contracting party, and not consent by the proxy, who merely represents the mandator's will. It would therefore be incorrect to confuse the capacity to contract marriage with the capacity to be a proxy. Consequently, under canon law, any person may serve as proxy provided that he has sufficient judgment to represent the contracting principal giving his consent in the marriage act according to the requirements of c. 1104: physical presence, personally fulfilling his function, and using words or equivalent signs in unity of time and place.

From the wording of c. 1105, it appears that the proxy may be a man or a woman, Catholic or not, a relative or not. For validity or for liceity it is not required that the proxy be of the same sex as the principal, although we feel that because it is an act of representation it is better that the proxy, if possible, be of the same sex as the mandator. For the validity of the act, § 1 specifies that the proxy has to be designated by the mandator, had received a special power to contract marriage with a specific person and has to personally fulfill his function. Thus the act would be null and void if the proxy were to act through a delegate or substitute, even if the mandator-contracting party gave him the power to do so.[1]

Since manifestation of consent by the parties contains the creation of a joint consensus from two separate wills—the *in fieri*—(*see* commentaries on cc. 1104 and 1107), it is evident, although the text of the canon does not expressly address the question, that any type of power that might lead to self-contracting (that reduces manifestation of consent to be the work of the will of only one of the parties) is not admissible. If both parties use a proxy for their marriage, they cannot use the same person. And, when one of the parties grants a power, he cannot designate the other party as his proxy.

4. *Requirements for the validity of the mandate*

First: According to § 1, the power must contain a specific mandate to give the principal's consent and must also contain the personal identification of the other party and of the proxy. Thus a general and nonspecific power to enter into marriage is null and void; that is, a power that does not designate the specific person of the other party, that does not designate the proxy by name or that leaves the choice up to the other party.

1. Cf. CPI, Resp., May 31, 1948, in *AAS* 40 (1948), p. 302.

Second: Under § 2, the formal instrument that contains the special power must be personally signed by the principal and also by the parish priest or the local Ordinary where the power is granted or by a priest delegated by either of the latter, or by at the least two witnesses. A novelty in the current discipline is the admission of the validity of powers granted in a formal instrument recognized as authentic and reliable by local civil laws for granting a power, this serves as a substitute for the canonical instrument. Current discipline thus admits three types of formal instruments: *a)* an ecclesiastical public document, signed by the principal and by the parish priest or the local Ordinary where it is granted or, otherwise, by a priest delegated for the purpose by the parish priest or the ordinary; *b)* a simple private document, signed by the principal and two witnesses; *c)* an authentic or reliable document conforming to the civil law of the place where it was granted and signed by the principal. In the specific case of Spain, an authentic document is governed by notarial legislation, under which it suffices to have the signature of the principal and of the notary-attorney, who certifies without witnesses required, unless the authorizing notary or any of the parties requires it or if the mandator does not read or write.[2]

Third: When the principal/party cannot write with his own hand for any reason, and for any formal instrument granting the mandate (an ecclesiastical public document, a private or reliable civil document), § 3 requires that this circumstance must be indicated in the mandate, and another witness is required, who must also sign the empowering document. Otherwise, the mandate is not valid.

5. *Period of effectiveness and extinction: difference between insanity as a cause of extinction of the mandate, and consensual incapacity under c. 1095*

As it is known, in the manifestation of consent through a proxy, it is the principal's will (never the proxy's will since he only represents the principal) that really participates in the act of contracting marriage. This means that the marriage is perfected at the moment the proxy gives consent in the name of his principal; no subsequent ratification by the contracting party is required. Theoretically, the power is in effect for an indefinite period of time unless it was expressly granted for a specific term.

With respect to the extinction of the mandate, § 4 states that if the principal revoked the mandate or became insane before the proxy acted in the name of the principal, the marriage would be null even if the proxy or the other contracting party did not know of the insanity. Note that when

2. Cf. Act of April 1, 1939 and art. 180 of the Notarial Regulations of June 2, 1944.

this legal norm is interpreted, revocation or insanity here are considered as *causes of extinction of the mandate ipso iure*, but not as direct defects or flaws in marital consent. If the mandate has expired, even if the proxy or the other contracting party is unaware of the fact, still, the natural consequence of nullity of consent follows because consent was given by a proxy without a mandate.

In cases of revocation, the mandate is extinguished as the first effect and the consent given without a mandate is null as the second and correlative effect. This is completely clear because the most direct cause of the extinction of a mandate is the voluntary withdrawal—revocation—of the power by the person who granted it. However, at first sight the question is not so clear with regard to the concept of insanity used in § 4 of c. 1105. Why use the term "insanity" (*amentiam*) instead of simply referring to the elements of consensual incapacity in c. 1095? As we see it, here the legislator is considering insanity as the cause of the extinction of the mandate and not as one of the causes of consensual disqualification listed in c. 1095. Logically, in the discipline covering marriages by proxy, the nullity of the marriage act that the legislator is now interested in regulating is the nullity caused by the invalidity or extinction of the mandate. Thus it is with good reason, when treating the causes of extinction of the mandate, that the legislator does not refer us to the defects or flaws of consent included in cc. 1095–1103. Granting a mandate and entering into marriage are very different juridical matters, even though the purpose of the mandate is to represent the contracting party in the manifestation of consent. Therefore we must differentiate between insanity as a cause of extinction of the mandate in § 4 of c. 1105 from the mental anomalies that can constitute defects of marital consent as provided in c. 1095, 2° and 3°. Consequently, insanity is interpreted to mean the loss of habitual possession of the sufficient use of reason necessary to grant the mandate. Since sufficient use of reason necessary to grant a mandate is the key to this concept of insanity, it follows that certain types of temporary mental illness or certain psychic anomalies referring to the essential rights and duties of marriage could fall under nos. 2° or 3° of c. 1095; however, they do not constitute incapacity to grant the mandate and therefore they cannot be a cause of extinction of the mandate if the mental problem arises after the power is granted. By the fact that these anomalies do not constitute the cause of the extinction of the mandate, does not impede that they can be causes of marriage nullities based on consensual incapacity. For example, if—after granting the proxy and before the marriage ceremony—the principal suffered a psychosexual condition (or had even suffered from it all his life), it would be perfectly possible for the mandate to be valid because the contracting mandator/principal was not insane under § 4 of c. 1105; but the marriage could be null due to the impossibility of assuming the essential obligations indicated in c. 1095, 3°.

Regarding proof, the revocation of the mandate does not demand to be done with the documental instruments and requirements proper to the valid formalization of the mandate. It is enough that the will has been really revoked by the mandator and its revocation should be recognized in the external forum through any kind of proof accepted by law, including the revoker's statement. Insanity that befalls a party is also subject to the same general type of proof in the external forum using the normal means of proof under the law. In conclusion, it should be noted that if neither revocation of the mandate nor the principal's insanity can be proven, the marriage contracted would enjoy a presumption of validity under c. 1060.

1106 **Matrimonium per interpretem contrahi potest; cui tamen parochus ne assistat, nisi de interpretis fide sibi constet.**

Marriage can be contracted through an interpreter, but the parish priest may not assist at such a marriage unless he is certain of the trustworthiness of the interpreter.

SOURCES: cc. 1090, 1091

CROSS REFERENCES: cc. 1057, 1066, 1101, 1104, 1108

COMMENTARY

Pedro-Juan Viladrich

The legislator admits manifestation of consent given with the help of an interpreter as valid and in this canon specifies the requirements for the interpreter's licit intervention. The interpreter's mission is to translate the words or equivalent signs of either or both of the contracting parties and of the qualified witness from one language to another so that all may understand the request for and giving of marital consent that constitutes the joint communication (*see* commentary on c. 1104). In contrast to the mandate (*see* commentary on c. 1105), the interpreter does not act in the name of an absent principal/mandator, does not represent the person or the will of a contracting party and therefore needs no special mandate or power whatsoever. Thus, anyone who has sufficient knowledge of the languages and is truthful may act as an interpreter. The interpreter must be capable of being a faithful translator of what the parties and the qualified witness say or express. There is nothing which prevents any of the common witnesses or even the qualified witness from lending their services to interpret the manifestation of consent.

In contrast to the previous discipline (cf. cc. 1090–1091 *CIC*/1917), for licit assistance at a marriage that is to be celebrated with the help of an interpreter, the qualified witness needs no just cause or permission from the ordinary to assist. Nevertheless, the fact that the current text eliminates those prior requisites does not mean that an interpreter can be used *without any reason whatsoever.* Our understanding is that if among the contracting parties and the qualified witness there is a common language and if there is no other reason for calling on an interpreter other than mere triviality, caprice or stubborn arbitrariness on the part of one of the parties in using a language unknown by the other participants, then the qualified witness may refuse to assist under such unjustified circumstances.

Therefore, when there is reason to use an interpreter, the text of this canon, for liceity, prohibits the parish priest (the qualified witness) from assisting at the ceremony only when he has not ascertained the faithfulness of the interpreter. The term "faithfulness" should be interpreted to mean that the interpreter is *both truthful and competent* so that, in the opinion of the qualified witness, the interpreter may fulfill his duty in a trustworthy manner. If the parish priest should come to a negative decision and refuse to assist, administrative recourse to the ordinary may be sought.

1107 **Etsi matrimonium invalide ratione impedimenti vel defectus formae initum fuerit, consensus praestitus praesumitur perseverare, donec de eius revocatione constiterit.**

Even if a marriage has been entered into invalidly by reason of an impediment or defect of form, the consent given is presumed to persist until its withdrawal has been established.

SOURCES: c. 1093

CROSS REFERENCES: cc. 1057, 1100, 1101, 1160, 1161, 1163

COMMENTARY

Pedro-Juan Viladrich

Marital consent without defect or flaw, even though it was given by the parties in accordance with the requirements indicated in c. 1104, may be juridically ineffective due to a diriment impediment or a defect in canonical form. Does this type of consent have any value? How long and under what circumstances is it valid? In this canon, according to the legislator, "consent given is presumed to persist until its withdrawal has been established."

1. *A "naturally sufficient consent" is a* "consensus praestitus" *according to the requirements in c. 1104 for a valid manifestation*

First we should explain which consent is presumed to persist. It is the "consent given"—*consensus praestitus*—which, according to the requisites of c. 1104, contains the conversion of the two parties' wills into a joint and unified consent that is the visible sign (*sacramentum tantum*) of the consent that establishes the bond (*res et sacramentum*). Consequently, a hypothetical contracting party's individual inner will that has not been formalized by legitimate manifestation between the two parties is not a *consensus praestitus* and does not enjoy the presumption of persistence established in c. 1107. Nor does a proposal to enter into marriage enjoy this consideration, not even if the particular proposal, communicated between the parties, is already a common proposal enabling the wedding date to be set by mutual agreement. To summarize, acts that take place in the sphere of motivating the nuptials, including acts of the will—even when shared—that move the biographical sequence along until the

parties are finally led up to the moment of entering into marriage, but which precede and are different from the act of contracting marriage, must not be considered as "given consent" (*consensus praestitus*).

The reason is evident (*see* commentaries on cc. 1057 and 1104). The effectiveness of the marital bond, insofar as it is dependent upon the voluntary contribution of each party, is caused by the *one union* of two inner wills that are formalized as one, in and by the perceivable manifestation of the parties to each other. This first joint or "conjugal" manifestation, because it alone establishes the unique marital bond, is marriage *in fieri*.

2. *Presumption of persistence*

Although a marriage may be invalid due to an impediment or formal defect, this canon establishes a presumption that the *consensus praestitus* endures between the contracting parties as the joint decision that established the marital bond so long as consent is not revoked. However, the basis of this presumption must not be interpreted in terms of an act of authority designed to maintain the stability of the marital bond by creating "merely juridical persistence" of an invalid consent so as in this way to be able to cure initial invalidity authoritatively and avoid any resulting risk of the parties changing their minds if, without the presumption of persistence, they had again to give a "new" consent. When establishing the presumption of persistence of the consent and when retroactively validating the marriage, this type of interpretation would place the legislator's action at the very brink of violating the principle of joint consent that governs the entire canonical marriage system and by virtue of which no human power may validly substitute for the true will of the contracting parties ("consensus... qui nulla humana potestate suppleri valet" in c. 1057 § 1). Furthermore, this type of interpretation would favor understanding the persistence of *consensus praestitus* in terms of a mere *fictio iuris*, that is, as "persistence only for juridical effects," rather than supported by the true state of the parties' will. But, persistence conceived as a fiction created by the legislator to better ensure, for the hierarchical authority, the stability of the institution of marriage, even though limited by its nature as a *iuris tantum* presumption, would involve an unusually restrictive interpretation of the requirements evidencing revocation and would require external proof equal to or greater than proof of consent given and would ignore the fact that the contracted marriage was, in fact, invalid.

In sum, the best interpretation of the persistence of consent in these cases is not an interpretation based on grave, authoritative pastoral reasons for the purpose of, on the one hand, imposing the maximum limitation on the conditions under which the parties could violate the principle of irrevocability of consent by changing their minds, and on the other hand, facilitating intervention by the ecclesiastical powers in a validation to

promote stability in marital situations and most importantly, the indissolubility of the bond. These reasons are not completely true, because the only irrevocable consent is an *effective consent*, not an invalid consent, and because the only indissoluble marriage that can be ensured to be stable is a valid marriage, not one that is objectively null. Thus, only by forcing the sense of c. 1107 can it be interpreted as a legislative manifestation of the irrevocability of consent or as protecting the indissolubility of the bond.

In reality, c. 1107 indicates quite the contrary. Instead of opposition, there is an extraordinary subjection to the principle of consensuality or joint consent. By presuming persistence, the legislator is recognizing *the prevailing value of the consensual or voluntary element* in comparison with the other components of a valid consent. According to § 1 of c. 1057, an effective consent results from a conjunction of the parties' will to marry, their juridical capability and legitimate manifestation. But in the final analysis, the discipline of impediments and canonical form is justified in order to protect the nature of marriage and the social effects of the parties' joint will, which, as a voluntary and mutual act of giving and accepting each other as spouses, constitutes the *quidditas* of consent. Without this joint will to marry, the lack of impediments or validity of form are nothing; therefore the legislator cannot recognize "persistence" or the continued effectiveness of the contracting parties' capacity or the continued effectiveness of mere canonical form. On the other hand—and this is what matters—when *the parties truly had the will to marry,* as demonstrated by their consent manifested according to the requirements of c. 1104, then there is something *real and sovereign* (the *quidditas* of consent). It is so real and sovereign that their will can never be *substituted* by any human power but for the same reason it also cannot be *ignored* by any human power, especially when the authorities prevent its effectiveness by legitimately applying impediments or requiring canonical form for accepting the manifestation of their will. To summarize: *If the parties' will to marry cannot be substituted when this did not exist, then it cannot be ignored by any human power if it did exist.*

There we can clearly see the true spirit of c. 1107. This is a case of *consensus praestitus* prevailing as the voluntary element that the parties alone can provide for the bond to be effective. In comparison with impediments and form, the voluntary element is the *quidditas* of consent. Because a real will to marry is the most important factor, the legislator must expressly recognize its sovereignty, which is two-fold. First, sovereignty requires recognizing the existence and effective power of consent when it has been formalized by its manifestation between the parties. This the legislator does by assuming "persistence" because there is a possibility that an impediment or formal flaw that impeded full effectiveness might cease or be dispensed and the effect be made retroactive to the initial moment of giving consent. The parties should not consent again as if their first and unrevoked will to marry were of no value. Recognition, expressed as an

assumption, *endures indefinitely* because, as is obvious, only the parties and not the legislator can will or not will to marry each other. Second, this exquisite recognition of the sovereignty of the parties' will also causes the legislator to recognize that either or both of the parties have the power to revoke their will to marry, as stated in c. 1107. Here the assumption of persistence ceases when it is proved that their will has disappeared. It is also accepted that if their will exists (presumption of persistence), it *cannot* be ignored, and that it cannot be provided when it no longer exists (acceptance of revocation).

3. *Revocation and proof of revocation*

In order to perceive the authentic signs of revocation existentially and practically, we need to understand the meaning of "persistence" of the consent given. Persistence does not mean a psychological situation in the parties where they are continually reiterating their initial giving and accepting of each other as spouses. It is not the "constant" repetition of a "transitory" act, such as the act of entering into a contract that makes it "persist." Rather it is quite the opposite; a persisting consent is a basic condition of the conjugal will of the "spouses." Let us take note that in contrast to the case of *scientia aut opinio nullitatis* (*see* commentary on c. 1100), here the parties are subjectively convinced of the validity of a bond that is, however, objectively invalid due to an impediment or formal defect. The parties who gave their consent without defect or flaw and who consider themselves married—while they are unaware of invalidity due to impediment or formal defect—are living in total acceptance of their identity as spouses. This state of total acceptance, under which they see themselves and are living as married to each other, is precisely "the persistence of consent," because this state is the particular effect in their psychological being and in the area of their vital behavior of having willed to marry and having effectively been married. The basic condition of seeing themselves as spouses ("This is my husband," "This is my wife," "I am your husband," "I am your wife") is theoretically more or less compatible with a better or worse relationship in married life, with all the good and bad things that happen to spouses in their life together in a valid marriage.

Therefore, revocation is the critical moment in conjugal identification, when either or both "spouses" show by their behavior or words that they no longer accept it. Revocation must be proved in the external forum. When in either or both of the "spouses" there is evidence of failure to accept their identities as spouses, consent can no longer be assumed to persist without taking the risk of supplying it *ab extra* by an act of authority in the *sanatio* of the nullity. The *objective existence of the risk of supplying consent* is sufficient for the principle of real consensuality to make unacceptable the continuity of the presumption of the perseverance of the

initial consent and, consequently, also the intervention of the authority in its retroactive validation. To prove revocation, therefore, it suffices to demonstrate that there are acts, words or behavior by either or both of the parties that contradict their initial acceptance of each other as spouses and lead the authorities to suspect that consensual will may be being supplied by the authorities themselves. We say that *doubt suffices*, because *favor matrimonii* in the case of doubt under c. 1060 is not applicable to this case of "persistence of consent." It is not applicable for the clear reason that here, in the case of c. 1107, there *is not the least doubt* of fact or of law that the marriage was contracted invalidly due to an impediment or formal defect. Since objectively there can be no doubt about the persistence of consent, the problem cannot be resolved in favor of the existence of consent, under c. 1060.

The best proof of revocation is the express manifestation of revocation by the revoking party when that party possesses the usual elements of credibility. If the party does not meet those requirements, both doctrine and jurisprudence, making use of precedents and casuistry, list certain cases as examples of acts and behavior that may indicate revocation of the persistence of the initial consent; for example, petitioning for an annulment, suing for divorce, or living *more matrimoniali* with another person. Both de facto or under canon or civil law, spousal separation is a strong presumption that initial consent has been revoked; but in any case, it is the true intention to revoke that must be heeded, for, in principle, it is not impossible for a person to choose separation specifically to be sure to maintain his condition as a legitimate spouse instead of choosing to bring suit for annulment or divorce.

We nevertheless understand that, in case of doubt about the persistence of consent, when it is a case of a null marriage according to the *fattispecie* of c. 1107, consent should not be considered to persist when one party affirms that it has been revoked. When the parties are unaware of the impediment or formal defect that invalidated their marriage and if there is reason to believe that if they did know they would cease living together or even bring suit for nullity, the authorities must not assume the persistence of consent under the supposition that it is an interpretive will. That is simply because it is the authority who performs this exercise of interpretative will, and the authority arbitrarily transfers it to the party's will in spite of contrary indications. An express refusal to renew consent by simple validation, yet continuing on in married life, is not a sign of the persistence of true marital consent. Rather it indicates a fornicating state of mind; therefore without applying rules *iuris et de iure*, in each specific case it is necessary to discover whether or not there is an authentic will to revoke.

To summarize: In each specific and concrete case, the canonist must look deeply into the mind of the legislator of this canon, whose purpose is to recognize and scrupulously respect *the true presence of marital will* in

cases of invalidity due to an impediment or formal defect, but never to assume it through a mere *fictio iuris*, never to supply it when the initial will no longer exists. In applying this canon to a specific case, the canonist must avoid either ignoring the true will of the parties or making the prejudicial assumption that it persists when there are acts and behavior that in each individual social and biographical context indicate that their will is wanting.

CAPUT V
De forma celebrationis matrimonii

CHAPTER V
The Form of the Celebration of Marriage

1108 **§ 1. Ea tantum matrimonia valida sunt, quae contrahuntur coram loci Ordinario aut parocho aut sacerdote vel diacono ab alterutro delegato qui assistant, necnon coram duobus testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in cann. 144, 1112 § 1, 1116 et 1127 §§ 1–2.**

§ 2. Assistens matrimonio intellegitur tantum qui praesens exquirit manifestationem contrahentium consensus eamque nomine Ecclesiae recipit.

§ 1. Only those marriages are valid which are contracted in the presence of the local Ordinary or parish priest or of the priest or deacon delegated by either of them, who, in the presence of two witnesses, assists, in accordance however with the rules set out in the following canons, and without prejudice to the exceptions mentioned in cann. 144, 1112 § 1, 1116 and 1127 §§ 2–3.

§ 2. Only that person who, being present, asks the contracting parties to manifest their consent and in the name of the Church receives it, is understood to assist at a marriage.

SOURCES: § 1: c. 1094; CodCom Resp. V, 25 mar. 1952 (*AAS* 44 [1952] 497); SCCong Decl., 7 oct. 1953 (*AAS* 45 [1953] 758–759); *LG* 29; *SDO* 22, 4; PCIDSVC Resp. 2, 26 mar. 1968 (*AAS* 60 [1968] 363); Secr. St. Resp., 21 maii 1968
§ 2: c. 1095 § 1, 3°; CodCom Resp., 11, 10 mar. 1928 (*AAS* 20 [1928] 120); *SC* 77; SCDF Resp., 28 nov. 1975

CROSS REFERENCES: cc. 134, 144, 368, 515, 516, 540, 549, 1111, 1112, 1116, 1127

COMMENTARY

Rafael Navarro-Valls

1. The establishment of a substantial juridic form for the celebration of canonical marriage has its *raison d'être* in a threefold necessity: that of suitably making a marriage public within the bosom of the ecclesial community; that of clarifying the certain existence of manifested consent; and that of protecting the specific content of canonical marriage. In certain doctrinal sectors, it has been understood that the first two functions would be adequately safeguarded by simple civil form, postulating, in consequence, a canonization of civil form that would come to substitute for canonical form, this becoming only necessary for liceity, not for validity.

This tendency (which was not embraced in the *CIC*) does not consider that canonical form has a *pedagogical* function that is substitutable with difficulty by civil form. Effectively, juridical form, together with liturgical form, has in canonical marriage a specific mission: that of *conserving and teaching* the proper content that Christian marriage includes. Without the imposition of a form required for validity for canonical marriage, the specific characters of Christian matrimony (unity, indissolubility, essence, etc.), little by little would become obscured from the vision of the faithful, making ecclesiastical jurisdiction practically inoperable upon them. Their *raison d'être* rests on the necessity that the institution of marriage, in its juridic ordering, be adjusted to the requirements of natural and divine law. For the rest, in the theses that tend to de-formalize canonical marriage, a paradox exists: one that pretends to substitute a formal structure of flexibility, which has already been proven, by another which has been super-formalized. With increasing frequency in civil marriage, formalism seems to set itself up as a protagonist. Civil marriage regulation does not understand clearly the extraordinary form of marriage without the assistance of the judge or the one who takes his place and does not comprehend dispensation of form.[1]

2. The configuration of canonical marriage as a *formal* juridic act (in addition to consensual) has been a constant in the law of the Church since the 1563 publication of the chapter *Tametsi* from the Council of Trent (Session XXIV, Decree *De reformatio matrimonii*, chapter 1). This disposition, which sets up a substantial juridic form that is required for validity, suffered some modifications in the Decree *Ne Temere* (August 2, 1907), and was substantially taken up by the *CIC*/1917 in c. 1094. In turn, c. 1108 reaffirms the line initiated in 1563, placing the validity of marriage (except the exceptions which are indicated) under the rule that, in the moment of

1. Regarding this point, cf. R. NAVARRO-VALLS, "Forma jurídica y matrimonio canónico," in *Ius Canonicum* 14 (1974), pp. 67ff.

celebration, a parish priest, the local ordinary, a priest, or deacon, delegated by one or the other, must attend at the marriage, as must two common witnesses.

3. The assistance of a *qualified witness* is not an act of the power of jurisdiction; from which we know that the ordinary, parish priest, or delegate fulfill only the function of authorized witness who, together with two common witnesses, give publicity to the act. However, the presence of the qualified witness and two common witnesses in the moment of celebration of marriage carry with them distinct characters. Thus, the first requires an active commission: he must solicit from the contractants external manifestation of their matrimonial consent, receiving it in the name of the Church. In this way, the indication of § 2 (*assistens matrimonio intellegitur tantum ...*) reaffirms the orientation of *Ne Temere* and the *CIC*/1917, by which the juridical effects are removed from *surprise* marriages, which were possible in broad interpretations of *Tametsi*, which required the simple *presence* of a qualified witness. Furthermore, even though the *CIC* has lifted the explicit mention that c. 1095, § 1,3°, *CIC*/1917 made, that the qualified witness not be compelled to his task to assist at the marriage by force or grave fear, no doubt remains that his assistance, for the validity of the marriage, must be *free*, not constrained by coercion, force, or fear. Precisely, in the preparatory works of the new Code, this reference was eliminated because it was understood to be "superfluous."[2] The presence of the common witnesses does not require a specific activity. For the rest, c. 1108 does not indicate what the required capacity is to witness on the part of these common witnesses, by which we understand that doctrinal and jurisprudential criteria, in which the use of reason and the capacity of sensitive perception of the marriage at which they assist is sufficient, remains in force. Their presence, in the end, has to be simultaneous with the qualified witness, morally and physically. It is debated whether a formal presence is required, that is to say, with the intention to assist as witnesses at marriage. From the context of the canon it seems that, *de iure condition*, their presence alone is enough and the capacity to give witness to the existence of the marriage celebrated before them, even though their presence, that of two common witnesses, is not free. In any case, jurisprudence has only indicated that the common witnesses must witness the giving of consent, being able, therefore, to testify about the celebration of marriage.[3]

4. The sacred minister to whom by his own right requires assistance at marriages is the local ordinary or the pastor. Under the name of local ordinary, one must include those specified in cc. 134 and 368, with the exceptions pointed out there: the Vicar General and the Episcopal Vicar. Because the power of the Episcopal Vicar is circumscribed by the materials

2. Cf. *Comm* 8 (1976), p. 37.
3. *Coram* Abbo, February 29, 1968, in *SRR Dec* 60 (1978), p. 150.

expressly entrusted to him, he can only assist at marriages validly if this faculty was given to him. Pontifical Legates, as such, do not enjoy the ordinary power to celebrate marriages. Under the concept of pastor, in addition to the one directly contemplated in c. 515, one would have to include the quasi-pastor (c. 516), the parish administrator (c. 540), the parochial vicar named in the case of the absence of the pastor (c. 549), and members of the "parish team" (c. 543), if the parish has been entrusted to a group of priests.

Also able to assist at marriages by delegation are other priests who are not pastor of the place of celebration, as well as deacons. Even though the *CIC*/1917 did not make specific reference to these last, their express mention in c. 1108 is not, strictly speaking, a novelty, given that first *Lumen gentium* 29, and later *Sacrum diaconatus ordinem* 22, 4, enumerated, among the functions of deacons, that of assisting in the name of the Church at the celebration of marriages, and also blessing them, through delegation of the bishop or pastor.

5. Paragraph 2 explains the technical sense with which the qualified witness is invested, in such a way that it becomes unnecessary, because it is understood, to repeat in the following canons the *active* sense that is always implied by the assistance of the qualified witness.

With respect to the exception that supposes the validity of the marriage in which the supply referred to in c. 144 is actualized, see the commentary on c. 1111.

1109 **Loci Ordinarius et parochus, nisi per sententiam vel per decretum fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati, vi officii, intra fines sui territorii, valide matrimoniis assistunt non tantum subditorum, sed etiam non subditorum, dummodo eorum alteruter sit ritus latini.**

Within the limits of their territory, the local Ordinary and the parish priest by virtue of their office validly assist at the marriages not only of their subjects, but also of non-subjects, provided one or other of the parties is of the Latin rite. They cannot assist if by sentence or decree they have been excommunicated, placed under interdict or suspended from office, or been declared to be such.

SOURCES: cc. 1095 § 1,1° et 2°, 1099 § 1,3°; *CA* 88 § 3; CodCom pro CIC Orientali Resp. 5 et 6, 3 maii 1953 (*AAS* 45 [1953] 313)

1110 **Ordinarius et parochus personalis vi officii matrimonio solummodo eorum valide assistunt, quorum saltem alteruter subditus sit intra fines suae dicionis.**

A personal Ordinary and a personal parish priest by virtue of their office validly assist, within the confines of their jurisdiction, at the marriages only of those of whom at least one party is their subject.

SOURCES: SCCong Instr. *Sollemne semper*, 23 apr. 1951, VI et X (*AAS* 43 [1951] 563–564); PIUS PP. XII, Ap. Const. *Exsul Familia*, 35, 36 et 39 (*AAS* 44 [1952] 700); SCCong Instr. *Per instructionem*, 20 oct. 1956, 98–109 (*AAS* 49 [1957] 158–159); SCB Instr. *Nemo est*, 22 aug. 1969, 38 et 39 (*AAS* 61 [1969] 633–634)

CROSS-REFERENCES: —

COMMENTARY

Rafael Navarro-Valls

1. Unlike the chapter *Tametsi*, which attributed to the *proper* pastor of the contractants competence to assist at marriage, the Decree *Ne*

Temere established the territorial criterion as that which delimited competence, in such a fashion that the pastor or local ordinary were, by their office, the only ones competent to assist at marriages celebrated within their territory. The *CIC*/1917 adopted an identical criterion, a criterion that, in its turn, c. 1109 captures. Even under the assumption in which, within the limits of their territory, there exists a personal jurisdiction (cf. c. 1110), they can validly assist at the marriages of those subject to such a jurisdiction, given that, in this case, the competence of the parish priest or local ordinary is cumulative with personal competence, except by express concession by the Holy See of the exclusivity to personal jurisdiction.

The classic example of personal jurisdiction is the military, which extends throughout Spain to all Army, Navy and Air Force soldiers, to students of the Academies and military schools, to their spouses, children and family members that live in their company, and to all of the faithful of both sexes, secular or religious, who faithfully serve for whatever reason or reside habitually in the quarters or dependent places of military jurisdiction. This jurisdiction extends equally to minor orphans or to pensioners and to military widows while they remain in this state. Also belonging to military jurisdiction are the members of the civil guard and state police.

Personal jurisdiction also includes, in the hierarchical structure of the Church, personal prelatures. However, they only enjoy personal jurisdiction to celebrate marriage if this faculty is granted to them in the document of their erection.

For the rest, in Spain certain personal parishes exist, such as those of the Mozarabics of Toledo and for foreigners Santa María de Corticela of Santiago de Compostela.[1]

2. Although c. 1109 does not make express reference to this, it is understood that the ordinary or parish priest only validly assists at marriages from the moment they take canonical possession of their offices.

This same canon only establishes two limits to the general criteria. The first is that the exercise of the faculty to assist at marriages is conditioned insofar as the local ordinary or the parish priest find themselves in the valid exercise of their pastoral charge. Validity is excluded from marriages celebrated before the ordinary or parish priest suspended from their charge, excommunicated, or under interdict. The second limitation is that at least one of the two contractants must belong to the Latin Rite. If both belong to an Eastern Catholic Church, the specific norms of that Church apply.

1. Cf. F. AZNAR GIL, "La nueva regulación de la forma canónica del matrimonio," in *Curso de derecho matrimonial y procesal canónico para profesionales del foro* (Salamanca 1984), p. 213.

These last norms are covered in cc. 828 and following of the *CCEO*. Perhaps the most significant is that established in c. 828 for the marriages of Eastern Catholics, which have to be celebrated, in principle, with "the sacred rite before the Hierarch of the place or the local pastor or a priest to whom one or the other has given the faculty to bless the marriage and, at least, before two witnesses ..." As § 2 of c. 828 points out, "one understands here by sacred rite the proper intervention of the priest that assists and blesses." This does not signify that the priest of the Latin Church cannot receive delegation to celebrate these marriages, given that in c. 830 § 1, of the *CCEO* this possibility is expressly established: "the Hierarch of the place and the local pastor ... can give to priests of whichever church *sui iuris, including the Latin Church*, the faculty to bless a determined marriage within the limits of their territory."

1111 **§ 1. Loci Ordinarius et parochus, quamdiu valide officio funguntur, possunt facultatem intra fines sui territorii matrimoniis assistendi, etiam generalem, sacerdotibus et diaconis delegare.**

§ 2. Ut valida sit delegatio facultatis assistendi matrimoniis, determinatis personis expresse dari debet; si agitur de delegatione speciali, ad determinatum matrimonium danda est; si vero agitur de delegatione generali, scripto est concedenda.

§ 1. As long as they validly hold office, the local Ordinary and the parish priest can delegate to priests and deacons the faculty, even the general faculty, to assist at marriages within the confines of their territory.

§ 2. In order that the delegation of the faculty to assist at marriages be valid, it must be expressly given to specific persons; if there is question of a special delegation, it is to be given for a specific marriage; however, if there is question of a general delegation, it is to be given in writing.

SOURCES: § 1: c. 1095 § 2; CodCom Resp. V et VI, 20 maii 1923 (*AAS* 10 [1924] 114–115); *LG* 29; *SDO* 22, 4; PCIDSVC Resp., 26 mar. 1968 (*AAS* 60 [1968] 363); Secr. St. Resp., 21 maii 1968; PCIDSVC Resp., 4 apr. 1969 (*AAS* 61 [1969] 348)
§ 2: c. 1096 § 1; CodCom Resp. VI, 20 maii 1923 (*AAS* 10 [1924] 115); CodCom Resp. IV, 28 dec. 1927 (*AAS* 20 [1927] 61–62)

1112 **§ 1. Ubi desunt sacerdotes et diaconi, potest Episcopus dioecesanus, praevio voto favorabili Episcoporum conferentiae et obtenta licentia Sanctae Sedis, delegare laicos, qui matrimoniis assistant.**

§ 2. Laicus seligatur idoneus, ad institutionem nupturientibus tradendam capax et qui liturgiae matrimoniali rite peragendae aptus sit.

§ 1. Where there are neither priests nor deacons, the diocesan Bishop can delegate lay persons to assist at marriages, if the Bishops' Conference has given its prior approval and the permission of the Holy See has been obtained.

§ 2. A suitable lay person is to be selected, capable of giving instruction to those who are getting married, and fitted to conduct the marriage liturgy properly.

SOURCES: SCDS Instr. *Ad Sanctam Sedem,* 7 dec. 1971; SCDS Instr. *Sacramentalem indolem,* 15 maii 1974; SCDW Normae, dec. 1974

CROSS REFERENCES: cc. 144, 1108

COMMENTARY

Rafael Navarro-Valls

1. Canon 1111 considers the possibility that, in addition to the qualified witness with ordinary power, others might assist with *delegated power.* It is good to point out *that only the local ordinary or parish priest may grant delegation, including all of those considered under this title* (see the commentary on c. 1108), as long as they are validly carrying out their office. Naturally, the delegation can only be granted for marriages celebrated within the territorial limits included in the power of the delegating official.

2. In the matter of delegation, some variations of this form are introduced regarding the regulation of the *CIC*/1917. On one side, the personal ambit of the delegation is amplified; on the other, the rule surrounding general delegations for marriages is equally amplified.

With respect to the first extreme, c. 1108 authorizes to receive delegation not only other priests, distinct from the parish priest of the place of celebration, but also deacons; in addition, c. 1112 admits the delegation in favor of laymen, under certain conditions. Certainly, the express mention of deacons and laymen is an innovation with respect to the *CIC*/1917, although it is not an innovation with respect to the general dispositions after the Code, or in light of particular express concessions granted more recently.

The delegation in favor of laymen, a clear novelty in the framework of common law, deserves greater attention. In the preparatory works of the new Code,[1] the question was posed in 1970 upon discussing the possibility of extending to laymen the faculty of assisting at marriage by delegation. However, such possibility was initially set aside, adducing that extraordinary form adequately sufficed in the situation pondered.

1. Cf. *Comm* 8 (1976), p. 40; and 10 (1978), pp. 92ff.

However, the question was posed again in the sessions of October 17–18, 1977. On this occasion, the suggestion prospered, although the agreement was made that a canon would be redacted where this theme was *expressly* regulated. The definitive reason was the advice given to the SCSDW, which confirmed that for some years the faculty of delegating to laymen the ability to assist at marriage had been granted in some regions where priests were lacking.

Thus, c. 1112 considers the type of delegation to which we have been referring. Considering the faculty to which § 1 alluded, only the diocesan bishop, not any ordinary or priest, can concede it, and always when the rest of the conditions are met.[2]

3. With respect to the widening of the regulation of delegations for marriage, unlike the *CIC*/1917, in which general delegation is only admitted in favor of cooperating vicars (to whom the Response of the CPI of July 19, 1970 made equivalent deacons assigned in a stable and legitimate form to a parish), c. 1111 admits delegation in favor of any priest or deacon who, although not specified, has not been excommunicated, put under interdict, suspended, or declared to be such through a sentence or decree. In the drafting of the canon, the proposition that cooperating vicars or coadjutors should enjoy general delegated faculty for marriage within the limits of their parish was rejected,[3] because such an extension could give rise to "useless conflicts."

Canon 1111 concretely states that the validity of whichever kind of delegation (general or special) depends on whether the delegating power grants it expressly to a specific person. Thus, tacit and interpretive delegation are excluded, although it seems sufficient that express delegation be granted in an implicit manner. In its turn, the special delegation must be granted for a determined marriage, according to the way it is specified, at least, by those circumstances, and those that are clearly deduced from the marriage being dealt with. In the case of special delegation, it is unnecessary that it be granted in writing. This is different from general delegation, which expressly requires this. A simple oral concession, therefore, is enough.

4. With respect to subdelegation, relating c. 137 with the Reply of the CPI of December 28, 1927,[4] those who have general delegation may subdelegate without needing any special authorization from the first delegator. However, the delegate for a determined marriage may only subdelegate his power when he has express authorization from the delegating power. Successive subdelegations are null, except when they have been expressly authorized by the first delegator.

2. Cf. regarding this type of delegation *EM*, art. 10.
3. Cf. *Relatio* 1981 (Typis polyglottis Vaticanis 1981), p. 259.
4. *AAS* 20 (1927), p. 61.

5. The fact that the sacred minister who assists at a marriage lacks proper power or delegation does not imply nullity of such a marriage. There exists in canon law a type of "safety valve" that impedes the nullity of marriage in these hypotheses. Such a technical expediency is the *supply faculty* to assist at marriage, that is to say, a derivation to marriage of the most ample figure of the supply of jurisdiction, that consists of the proper law, through a fiction, and given some situations, grants jurisdiction to whom this is lacking.

To understand its application to marriage in the *CIC*, a brief reference should be made to the terms of the question in historical law. Before the promulgation of the *CIC*/1917, doctrine and jurisprudence agreed that the figure of supply of jurisdiction was applicable to the cases of ordinary lack of jurisdiction to assist at marriage. The legal corpus of 1917 having been promulgated, the question was raised whether c. 209, which regulated the supply of jurisdiction in the cases of common error and probable and positive doubt, was applicable also to marriage, given that the assistance at marriage was not strictly an act of power of jurisdiction. The post-Codal jurisprudence, without entering the doctrinal discussion, followed the practice of the ancient law, and in sufficient suppositions of the celebration of marriage with formal defects, it applied c. 209. Successive declarations of the CPI (especially those of December 28, 1927) endorsed this mode of jurisprudential procedure, dealing with the delegation to assist at marriages and the delegation of jurisdiction in an analogous manner, by which it reaffirmed the applications of the dispositions concerning ordinary power and delegated power to the form of marriage. On March 26, 1952, the CPI positively clarified the doubt whether the prescriptions of c. 209 were applicable to the case of a priest who, lacking jurisdiction, assists at marriage. Posterior jurisprudence to the Reply of 1952[5] gave the following conclusions: *a)* in order that the supply by *common error* should come into play, it is required both that public fact induce the error and that the application of the supply redound to the general interest, that is, the supply should not operate in the case of having repercussions in the interest of a single marriage (his requirement was criticized by some doctrine, adducing that the notion that common error for the public good could not be assimilated, given that the same c. 209 did not make express mention of that possibility); *b)* in order that *positive and probable* doubt should be the determining cause of the application of supply, it is not enough that the error should be provoked by negligence, ignorance, or lack of zeal, instead the existence of reasons that are not simply negative should be required, which would support the possibility of being in the possession of the power to assist at marriages. Furthermore, these

5. Regarding this point: E. BAJET, "La forma matrimonial en la jurisprudencia," in *Revista Española de Derecho Canónico* 103 (1980), particularly pp. 175–182.

reasons have to be solid, though not necessarily so firm that they should exclude all possibility of error.

At this point, after a series of vacillations in the process of elaboration of the *CIC*, this brings together the application to marriage of the supply of jurisdiction through a double remission: the first, from c. 1108, § 1, to c. 144; the second, of c. 144, § 2, to c. 1111, § 1.

6. The result of this double remission is that in the hypothesis of common error of fact or of law as much as in positive and probable doubt of law or of fact, the Church supplies the faculty to assist at marriages, as much in the case of defect of ordinary power as in that of delegated power except in the case that the qualified witness be a layman who acts according to the circumstances contemplated in c. 1112.

a) The first hypothesis in which supply operates is the case of common error concerning the power the qualified witness has to assist at marriage. The most satisfactory interpretation, as much in the light of the rationale of the Code as in its doctrinal derivations, is to understand that to figure out if common error exists, it is enough to evaluate three things: that competence was lacking to the sacred minister, that a public or notorious fact was given that seems to attribute competence to whom it was lacking and that this fact was in itself apt to induce error. In this respect, the act of convincing that the sacred minister possesses competence does not arise only by an express annunciation of this supposition but instead, as happens in many cases, the act of convincing precedes from other factors, principally ignorance. Thus, when a priest presents himself vested in liturgical clothes to assist at marriage, in general, those attending, judge, whether he has it or not, that he has competence to assist. From this, it follows that in normal circumstances in the celebration of marriage, in the Church having published banns and matrimonial expediency, the supply of jurisdiction always exists both because it is a common error of fact (the priest coming out dressed and disposed to assist at marriage is a fact capable of inducing error) and of law, because the majority of attendees would think that he possesses the faculty to assist. Only in a secret marriage or one celebrated before few witnesses or outside the church might one think that the supply of the faculty to assist was absent.[6]

b) In another order of things, common error can be determined not only with regard to material competence, but also with regard to territorial competence. That is to say, the determination of error can turn on whether a determined place belongs to the territory of the parish, in which case the error also affects those who possess competence to assist at marriage by reason of office, as well as by delegation.

6. Cf. J.M. GONZÁLEZ DEL VALLE, *Derecho matrimonial canónico según el Código de 1983* (Madrid 1983), p. 109.

c) If the case of common error refers to the lack of knowledge that the holders of the function have regarding the incompetence of the assisting minister, the second hypothesis upon which this supply operates is that case, positive or probable doubt, in which the proper assisting minister does not know if he is competent to celebrate the marriage. In virtue of c. 144, he could always assist at marriage if he is in a situation of positive or probable doubt. By positive doubt, one understands that which is accompanied by arguments that give some foundation to sustain the understanding that he has faculties to assist. The probability of doubt refers to said arguments, which have to be solid. Without a doubt, and as González del Valle[7] observes, the marriage is not made null because the case of probable and positive doubt is not given, since normally the hypothesis of common error would come into play.

7. Ibid., p. 130.

1113 **Antequam delegatio concedatur specialis, omnia provideantur, quae ius statuit ad libertatem status comprobandam.**

Before a special delegation is granted, provision is to be made for all those matters that the law prescribes to establish the freedom to marry.

SOURCES: c. 1096 § 2

1114 **Assistens matrimonio illicite agit, nisi ipsi constiterit de libero statu contrahentium ad normam iuris atque, si fieri potest, de licentia parochi, quoties vi delegationis generalis assistit.**

One who assists at a marriage acts unlawfully unless he has satisfied himself of the parties' freedom to marry in accordance with the law and, whenever he assists by virtue of a general delegation, has satisfied himself of the parish priest's permission, if this is possible.

SOURCES: c. 1097 § 1,1° et 3°; SCDS Instr., 4 iul. 1921 (*AAS* 13 [1921] 348–349)

CROSS-REFERENCES: cc. 1066, 1067, 1070

COMMENTARY

Rafael Navarro-Valls

1. Because the duty and right to investigate the freedom of those to contract marriage is incumbent upon the pastor who is competent to assist at the celebration of marriage, c. 1113 requires that this investigation be done before special delegation is conceded. This is not required *imperatively* in the case of general delegation, given that this would suppose a limitation that would constrain the general faculty obtained. Nonetheless, c. 1113 does not provide an invalidating clause: from this can be understood that, if special delegation were conceded without an investigation of the freedom to marry of those to contract marriage, this would not

necessarily nullify the delegation. It is helpful to keep in mind that, in the early drafts of this canon, the validity of the concession depended on this requirement. However, this invalidating clause was eliminated.[1]

2. On the other hand, one must not confuse the duty imposed by c. 1113 with the obligation established in c. 1114. The first determines when the pastor or the ordinary can licitly concede special delegation. Canon 1114 establishes when the person with the faculty to assist (proper or delegated) does so licitly. The general obligation that before the celebration of marriage one must determine with certainty that nothing opposes the valid and licit celebration was established in c. 1066. Canon 1114 establishes that it would be illicit for a minister to assist at a marriage unless he *personally* ascertains the freedom of the contracting parties. However, in the case of general delegation, the necessity to obtain the license of the pastor where the marriage is celebrated is mitigated, each time that the general faculty is actualized. This is done in order not to make excessively onerous the exercise of the obtained delegation. In any case, the license to which c. 1114 refers is conditioned for its lawfulness so that circumstances do not come together which would make the request for this delegation difficult.

1. Cf. *Comm* 10 (1978), p. 89.

1115 **Matrimonia celebrentur in paroecia ubi alterutra pars contrahentium habet domicilium vel quasi-domicilium vel menstruam commorationem, aut, si de vagis agitur, in paroecia ubi actu commorantur; cum licentia proprii Ordinarii aut parochi proprii, alibi celebrari possunt.**

Marriages are to be celebrated in the parish in which either of the contracting parties has a domicile or a quasi-domicile or a month's residence or, if there is question of *vagi*, in the parish in which they are actually residing. With the permission of the proper Ordinary or the proper parish priest, marriages may be celebrated elsewhere.

SOURCES: c. 1097 § 1,2°

CROSS-REFERENCES: c. 1118

COMMENTARY

Rafael Navarro-Valls

1. The *CIC*/1917 articulated a preference for celebrating marriages before the wife's parish priest, except in inter-ecclesial unions, where the preference in law was for the Church and parish priest of the man (c. 1097). However, c. 1115 does not repeat the preference due to the elimination of stole rites, as well as other considerations.[1] Several consultors believed that it was advisable to grant spouses the freedom to choose where their wedding was to be held, and the consultors agreed that marriage should be celebrated within the proper ecclesial community. That is why the provisions in c. 1115 favor celebrating marriage in the proper community, while maintaining a certain freedom of choice for the couple.[2] Therefore, for liceity, it is established that a wedding be held in the parish where one of the parties has his or her domicile or quasi-domicile or has resided for one month. If it is a question of *vagi*, the wedding is to be celebrated in the parish where they reside at the time.

A celebration elsewhere is conditional on permission from the proper ordinary or from the proper parish priest. This permission should not be confused with delegation, which is binding for the validity of the

1. Cf. *Comm* 8 (1976), pp. 55–56; and 10 (1978), p. 91.
2. Cf. F. AZNAR GIL, "La nueva regulación de la forma canónica del matrimonio," in *Curso de derecho matrimonial y procesal canónico para profesionales del foro* (Salamanca 1984), pp. 228–229.

marriage when it is celebrated by a priest or deacon other than the parish priest or local ordinary.

2. Before the *CIC* was promulgated, the CBS offered some guidance in this area (nos. 63–68) in the Ritual of Marriage. It recommended dissuading couples from celebrating their marriage in certain locations for "vain ostentation or financial or other unjustifiable reasons." It also provided that, apart from the general criterion established (parish where one or both have their domicile, quasi-domicile, or residence for one month), the marriage can also be held in the parish where they will establish their domicile after the wedding.

1116 **§ 1. Si haberi vel adiri nequeat sine gravi incommodo assistens ad normam iuris competens, qui intendunt verum matrimonium inire, illud valide ac licite coram solis testibus contrahere possunt:**

1° in mortis periculo;

2° extra mortis periculum, dummodo prudenter praevideatur earum rerum condicionem esse per mensem duraturam.

§ 2. In utroque casu, si praesto sit alius sacerdos vel diaconus qui adesse possit, vocari et, una cum testibus, matrimonii celebrationi adesse debet, salva coniugii validitate coram solis testibus.

§ 1. If one who, in accordance with the law, is competent to assist, cannot be present or be approached without grave inconvenience, those who intend to enter a true marriage can validly and lawfully contract in the presence of witnesses only:

1° in danger of death;

2° apart from danger of death, provided it is prudently foreseen that this state of affairs will continue for a month.

§ 2. In either case, if another priest or deacon is at hand who can be present, he must be called upon and, together with the witnesses, be present at the celebration of the marriage, without prejudice to the validity of the marriage in the presence of only the witnesses.

SOURCES: § 1: c. 1098,1°; CodCom Resp. VIII, 10 nov. 1925 (*AAS* 17 [1925] 583); CodCom Resp. I, 10 mar. 1928 (*AAS* 20 [1928] 120); CodCom Resp. I, 25 iul. 1931 (*AAS* 23 [1931] 388); SCDS Resp., 24 apr. 1935; CodCom Resp. 2, 3 maii 1945 (*AAS* 37 [1945] 149); SCDS Instr. *Ad Sanctam Sedem,* 7 dec. 1971
§ 2: c. 1098,2°; *LG* 29; *SDO* 22, 4; PCIDSVC Resp., 26 mar. 1968 (*AAS* 60 [1968] 363) Secr. St. Resp., 21 maii 1968; PCIDSVC Resp., 4 apr. 1969 (*AAS* 61 [1969] 348)

CROSS-REFERENCES: c. 1108

COMMENTARY

Rafael Navarro-Valls

1. The extraordinary form of the celebration of marriage is a result of a historical evolution related to concrete pastoral needs, coupled with a

technical development that has not always been consistent with these pastoral concerns.[1]

The Council of Trent had not formally addressed cases in which it was impossible to enter marriage in the form established in its Decree *Tametsi*, that is, before the parish priest and at least two witnesses. However, the issue did not take long in being raised. In mission countries, there were few priests, and in certain places, religious wars occasionally made the attendance of a Catholic priest at a marriage very difficult.

In the Netherlands, the Decree *Tametsi* was published in some parishes between 1566 and 1571. However, when these territories became Calvinist, Catholic priests were persecuted, which made it practically impossible for Dutch Catholics to celebrate their marriages in the only way provided by Trent. Faced with these difficulties, canonists agreed that a positive law, such as that of Trent, could not prevail over the natural right of each person to enter marriage. When Rome was consulted, initial responses in 1586 were opposed to allowing for exceptions to *Tametsi*, even for special cases. However, a Decree of the SCCouncil of September 26, 1602 (confirmed by the Pope in 1603) declared that Catholic marriages could be celebrated validly in the presence of two witnesses in regions without priests or with priests in hiding due to religious persecution.

Therefore, although it was not recognized formally in any legal text, the extraordinary form was born with the 1602 Decree. Its authority was that of a *Stylus Curiae*, with practically a normative character. The extraordinary form could be used only in limited cases of the physical absence of the priest. Subsequent particular norms were consolidating it.

The Decree *Ne Temere* would comprehensively regulate the extraordinary form. It recognizes two extraordinary forms. The first required the presence of any priest and two witnesses, and one could resort to it in order to quiet one's conscience and legitimize children, when a betrothed party was in danger of imminent death and it was impossible for the competent parish priest or ordinary to attend. The second only required the presence of two witnesses, for cases when it was commonly and absolutely impossible to find a competent minister. However, it replaced the subjective element of an Instruction of 1863 (a *prediction* by the betrothed parties themselves that the absence of the priest may last for a month) with the *fact* of the competent minister's absence for a month.

Just before the promulgation of the *CIC*/1917, the extraordinary form could only be used by those for whom it was morally impossible to find a competent parish priest. The *CIC*/1917 did not make any substantial change to the preexisting legislation. It provided that there is only one

1. Regarding this question, cf. H. WAGNON, "La forme extraordinaire du mariage canonique," in *L'Année canonique* 15 (1971), pp. 557–575; I. MARTÍNEZ ALEGRÍA, *La forma extraordinaria del matrimonio canónico: Origen histórico y régimen jurídico vigente* (Madrid 1994).

extraordinary form, consisting of the exchange of consent *coram solis testibus*; the attendance of a priest is not a requirement for validity. Danger of death was described as encompassing cases when a person's life is in actual danger and, apart from these cases, it is not required that the absence of the parish priest actually last one month. It is sufficient that the parties reasonably foresee that the absence *could* last a month.

As the *CIC*/1917 did not directly refer to the case of a parish priest's *moral* inability to attend, disputes on this issue continued. In view of difficulties in interpreting c. 1098, on July 25, 1931, the CPI admitted that the case in which a parish priest, although he is physically present in his parish, cannot attend the celebration of marriage should be equal to his physical absence. Subsequent statements confirmed this measure. In this way, through successive interpretations, the meaning and scope of the law were modified. Use of the extraordinary form was authorized in cases that were increasingly numerous, in which real need was replaced by the convenience of the spouses. It was not unusual for criticism of the system to arise as a result of abuses.

2. Notwithstanding this criticism, c. 1116 is an exact copy of c. 1098 of the *CIC*/1917, with one innovation relating to the intent to enter a true marriage. This was done because the practice of the previous system demonstrated paradoxical situations that should be prevented. Persons subject to the canonical form of marriage, finding themselves in the objective situations described in c. 1098 of the *CIC*/1917, would celebrate civil marriages without the intention of entering a canonical marriage. This led to particular confusion if the civil marriage was later declared null due to a failure to observe the civil requirements and, at the same time, declared valid by ecclesiastical authorities applying c. 1098. As was noted, "They did not remain married as they (civilly) intended, but they did remain joined in (canonical) marriage, which had not been consciously intended."[2]

3. Canon 1116 demands a series of objective conditions for the validity of marriages celebrated with the extraordinary form.

First, there must be no competent qualified witness with proper or delegated power, or one must be unable to use this witness without serious difficulties. The difficulty may be on the part of the parties or the qualified witness, and it may be due to either physical or moral impossibility. However, there would not be moral impossibility if the qualified witness's failure to appear were the corollary of an express canonical norm, such as c. 1085 § 2.

The impossibility must be objective and personal. Objective means that the qualified witness's inability to appear must be due to actual

2. J.L. YSERN, "El matrimonio canónico insconcientemente contraído," in *Apollinaris* 49 (1976), p. 477. Regarding this problem, cf. also J. MARTÍNEZ-TORRÓN, "La valoración del consentimiento en la forma extraordinaria del matrimonio canónico," in *Revista Española de Derecho Canónico* 117 (1984), pp. 431–458.

circumstances, not false subjective assessments. If there is no objective inability, the marriage would be null.[3] Personal inability is one that affects the couple, regardless of the circumstances that exist in the place or for other persons. It is sufficient that there be a relative inability, either because the means that should be employed to overcome the difficulties are extraordinary for the parties in particular, or because the harmful consequences following the celebration of the ordinary form of marriage are grave from the perspective of view of the couple.

The marriage may be celebrated in the extraordinary form before two witnesses only in cases of danger of death or absence of the qualified witness for one month. With respect to the danger of death, it is sufficient if it affects just one party to the union and its imminence is not necessary, if the danger is close, even if later occurrences refute this assessment. Therefore, danger of death in this context refers not only to a strict case of marriage *in articulo mortis* but other circumstances as well, either in the person of one or both parties (grave illness of which a fatal result is expected) or situational (dangerous trip with the possibility of a fatal accident, imminent combat in battle, danger of shipwreck, etc.). The danger of the situation must be assessed according to human means of prediction, which is why a mistake in assessing the danger does not imply nullity of the marriage, except in situations of simulation or clear rashness.[4]

Apart from the danger of death, the marriage will also be valid and licit before only two witnesses if it is foreseen that the physical or moral inability to attend the marriage due to a lack of a qualified witness or serious inconvenience for the betrothed parties in resorting to him or her will last for at least a month. As specified in the CPI,[5] the mere fact of the absence of the parish priest is not sufficient: moral certainty that this absence will last for one month is necessary. If one has reached this assessment prudently, the marriage will be valid, even if, before the end of one month, the qualified witness appears. The one-month time period is counted from the time everything is ready for the celebration of the marriage.

4. Canon 1116 § 2 adds a purely exhortative clause: if another priest or deacon could be present, he must be called upon to attend the marriage, together with the witnesses. Whether or not this cleric attends, the marriage is valid, if it is celebrated before two witnesses.

Regarding witnesses, no special conditions to be met are specified. Therefore, everyone can perform that function, if they have use of reason and can give witness to the celebration of marriage.

3. Cf. *coram* MASSIMI, January 30, 1926, in *SRR Dec* 18 (1926), p. 18, no. 3.
4. Cf. the sentences and commentaries re-printed in *Monitor Ecclesiasticus* 142 (1967), pp. 458ff. Also: *SRR Dec* 54 (1962), p. 422, nos. 81ff.
5. *Response*, November 10, 1925, in *AAS* 17 (1925), p. 583.

1117 Statuta superius forma servanda est, si saltem alterutra pars matrimonium contrahentium in Ecclesia catholica baptizata vel in eandem recepta sit neque actu formali ab ea defecerit, salvis praescriptis can. 1127 § 2.

The form prescribed above is to be observed if at least one of the parties contracting marriage was baptized in the catholic Church or received into it and has not by a formal act defected from it, without prejudice to the provisions of Can. 1127 § 2.

SOURCES: c. 1099 § 1

CROSS-REFERENCES: cc. 1086, 1127

COMMENTARY

Rafael Navarro-Valls

1. After the amendment of c. 1099 of the *CIC*/1917 by the *Motu proprio Decretum Ne Temere* of August 1, 1948,[1] the obligation to observe the canonical form of marriage was determined by baptism in the Catholic Church or by conversion to Catholicism. This system remained substantially in force until the promulgation of the new *CIC*, except for amendments introducing provisions for mixed marriages that excluded the obligation *ad valorem* of the canonical form for marriages celebrated between a Catholic and a baptized non-Catholic, provided that they are celebrated in the presence of a sacred minister.

2. Canon 1117 reaffirms the system described, but it excludes persons who abandon the Catholic Church by a formal act from observing the canonical form of marriage. The term used (*actu formali*) requires thorough exegesis, because it is susceptible to varying interpretations that do not agree not strictly. From the preparatory work of the *CIC*,[2] it can be deduced that formal separation is not always equivalent to a public or notorious act of separation from the Catholic faith. Thus, the term *public* can include both formal defections from the Catholic faith and a separation followed by affiliation with another confession, such as a life that *notoriously* conflicts with Catholic doctrine, without a formal act of defection. Therefore, those who have notoriously abandoned the Catholic faith are

1. *AAS* 40 (1948), p. 305.
2. Cf. *Comm* 8 (1976), pp. 54–56; and 10 (1978), pp. 96–98.

not always exempt from the canonical form of marriage, because c. 1071 § 1, 4° implicitly binds them.

In addition, in the preparatory works of the *CIC*, the consultors also discussed[3] whether persons who were educated *extra Ecclesiam*, without a formal act of abandonment of the Catholic faith, should be excluded from the obligation of the canonical form of marriage. It was decided not to use wording that would involve the addition of juridical consequences to acts that cannot be easily evaluated for juridical purposes, such as education *extra Ecclesiam*. Therefore, the expression *formal act* should be strictly interpreted, to safeguard juridical security.

Therefore, an irregular life, an education *extra Ecclesiam*, or a public departure from Catholic principles is insufficient to release one from the obligation of the canonical form of marriage. A public act that implies a formal departure from the Catholic Church is necessary, that is, an external juridical act from which one may unequivocally infer a formal departure from the Catholic Church. In any event, the problems that may arise from the exemption established in c. 1117 seem to demand an authentic declaration by the Holy See that definitively clears up any resulting doctrinal uncertainties.[4]

3. Having validly received baptism is insufficient for the obligatory nature *ad valorem* of the canonical form of marriage; the baptism must have been received in the Catholic Church. The obligation to canonical form still binds Catholics who enter marriage with non-baptized persons or with baptized non-Catholics.

4. In short, observing the substantial juridical form of marriage is a requirement for the validity of the marriage for baptized persons who belong to the Catholic Church, whether they enter marriage with each other or a non-Catholic. However, if a Catholic marries an Eastern non-Catholic, the canonical form of marriage is binding only for liceity, not for validity. The canonical form of marriage is not obligatory when non-Catholics marry each other or for persons baptized in the Catholic Church who later abandon it by formal act.

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3. Cf. *Comm* 8 (1976), pp. 59–60.

4. For a good analysis of such difficulties, cf. R. RODRÍGUEZ CHACÓN, "El acto formal de apartamiento del canon 1117," in *Revista Española de Derecho Canónico* 46 (1989), pp. 557–591

1118 **§ 1. Matrimonium inter catholicos vel inter partem catholicam et partem non catholicam baptizatam celebretur in ecclesia paroeciali; in alia ecclesia aut oratorio celebrari poterit de licentia Ordinarii loci vel parochi.**

§ 2. Matrimonium in alio convenienti loco celebrari Ordinarius loci permittere potest.

§ 3. Matrimonium inter partem catholicam et partem non baptizatam in ecclesia vel in alio convenienti loco celebrari poterit.

§ 1. A marriage between Catholics, or between a catholic party and a baptized non-Catholic, is to be celebrated in the parish church. By permission of the local Ordinary or of the parish priest, it may be celebrated in another church or oratory.

§ 2. The local Ordinary can allow a marriage to be celebrated in another suitable place.

§ 3. A marriage between a catholic party and an unbaptized party may be celebrated in a church or in another suitable place.

SOURCES: § 1: c. 1109 §§ 1 et 3
§ 2: c. 1109 §§ 1 et 2
§ 3: c. 1109 §§ 1 et 3; OCM ch. III

CROSS REFERENCES: cc. 530, 556, 844, 933, 1111, 1112, 1115, 1127 § 2, 1205, 1214, 1219, 1223, 1225, 1226, 1230

COMMENTARY

Ana María Vega

Chapter. V of this title ends with mention of a series of issues affecting the lawfulness of marriages: the ones that establish the liturgical form of this sacrament (cc. 1118–1120) and those that refer to its registry notification (cc. 1121–1123).

The first of the canons making up this last part of the norms related to the form of marriage concerns its place of celebration. The Code systematically distinguishes the territorial requirements (c. 1115) from the requirements related to location (c. 1118). Territorial requirements are treated in the context of the canons on the substantive juridical form, with

which they are intimately related, while the canonical criteria related to the incidental question of the place of celebration are considered later.[1]

Trent allowed marriage to be celebrated in any secular or sacred proper place, as long as it was celebrated with a solemn nuptial blessing.[2] Both the *CIC*/1917 and the *CIC* amended this provision, requiring that the celebration of the marriage take place in the church itself or before it. Since the first centuries of the Church, the demand that spouses express their will to join in the Lord *in facie Ecclesiae*[3] has been understood in light of the fact that Christian marriage is a celebration of the Church community.

The current canonical discipline on marriage is more flexible than the *CIC*/1917 with respect to the place marriage is to be celebrated, although the determining factor is the same in both the *CIC*/1917 and the *CIC*: the religious confession of the couple. However, because of ecumenism, the *CIC* treats mixed marriages in a way similar to marriages between Catholics. This is largely due to the influence of the *Motu proprio Matrimonia Mixta*, which specifies that the Church does not place mixed marriages and disparity of cult unions on the same doctrinal or canonical level, because "those who, even though they are not Catholic, believe in Christ and have duly received baptism, are established in a certain communion, albeit imperfect, with the Catholic Church."[4]

1. Canon 1118 § 1 treats marriages between two Catholics, or a Catholic party and a baptized non-Catholic. Pursuant to the ecumenical principles set forth above, the *CIC*, gives an identical juridical treatment to marriages between Catholics and mixed marriages. This significant shift in Catholic ecclesiology hails from the SCDF Instruction *Matrimonii Sacramentum*, which derogated from the requirement of the *CIC*/1917 (c. 1109 § 3) that both mixed marriages and disparity of cult unions take place outside the church.[5] At present, the proclamation of the sacramental nature of marriage between any two baptized persons inspires the general criterion that provides for the celebration of marriage in a sacred place (c. 1205).

The framework established by c. 1118 for the determination of a sacred place balances celebration of marriage in the proper community and freedom of choice for the betrothed parties.[6]

1. Cf. A. BERNÁRDEZ CANTÓN, *Derecho matrimonial canónico* (Barcelona 1951), p. 19.
2. Cf. F. BLANCO NÁJERA, *El código de derecho canónico* (Cadiz 1945), p. 367.
3. CBS, *Ritual del matrimonio* (Madrid 1971), prenot. 65.
4. Cf. *UR*, 3; CBS, *Ritual del matrimonio*, cit., prenot. 17.
5. Cf. *MS*, no. IV.
6. Cf. F.R. AZNAR GIL, *El nuevo derecho matrimonial*, second ed. (Salamanca 1985), p. 441.

Several alternatives were suggested in the revision of the *CIC*, including celebration before the wife's parish priest,[7] celebration in the proper parish, and absolute freedom of choice of the place of celebration for the parties, without any obligation other than to communicate it to their parish priest. The consultors decided on an intermediate alternative that would guarantee prenuptial investigation and would favor "ut, quantum fieri possit, matrimonia in propria communitati paroeciali celebrentur."[8] Consequently, the *mens legis* is that marriages should be celebrated in the proper parish of the parties, unless there are causes that reasonably exempt them.

Vatican Council II and the *CIC* vigorously stress the community nature of the parish in the particular church. Thus, the parish community is called to actively participate in matrimonial pastoral activity, given the deep ecclesial and community significance of this sacrament.[9] Therefore, c. 530 indicates that attendance at the celebration of marriage is a function especially entrusted to the parish priest,[10] although not reserved solely to him (cf. cc. 1111–1112). Marriages entered into between a Catholic party and a non-Catholic baptized party must be celebrated in the parish of the Catholic, unless a dispensation is granted according to c. 1127 § 2. In the case of *vagi*, the proper place is the parish where they reside at the time of the wedding.

However, the obligation to celebrate marriage in a parish church should be understood within the broad spirit favoring free choice of the place where the marriage is to be held.[11] Therefore, with permission from the local ordinary or parish priest, marriages involving a Catholic and a baptized non-Catholic may be held in another church (c. 1214) or oratory (c. 1223). The *CIC* has eliminated the distinction between public oratories

7. Some consultors judged that "illam normam servari posse quin aliqua connexio cum quaestione iurium stolae implicetur; imo valde conveniens est si illa norma servetur quia in multis regionibus respondet moribus peculiaribus populi." *Comm* 8 (1976), pp. 55–56; ibid. 10 (1978), p. 91.

8. Cf. *Comm* 9 (1976), pp. 46–50; 10 (1978), pp. 91–92.

9. "Since matrimony is ordered toward the increase and sanctification of the city of God, its celebration includes a communal aspect that advises the participation of the parochial community, either half or a little less than half of its members" (OCM (1990), *praenot*, 28). "The celebration of the sacrament of marriage requires not only the presence of the priest or deacon, who ask for and witness the consent of the spouses, but also the formed Christian community. Therefore, in addition to a narrow circle of family and friends the presence of the parochial community should be sought after." (CBS, *Ritual del matrimonio*, cit., prenot. 65). Cf. *FC* 67; "Decreto de promulgación del Directorio para la preparación y celebración del matrimonio de la Provincia eclesiástica de Granada," May 22, 1990, no. 3, in *BO Interdiocesano para Andalucia Oriental* 18 (1990), p. 323; "Decreto de promulgación del Directorio de Pastoral sacramental del Obispado de Calahorra-Logroño," September 15, 1988, no. 185, in *BO de la Diócesis de Calahorra-Logroño* 129 (1988), p. 318.

10. Cf. A. VIANA, "El párroco, pastor propio de la parroquia," in *Ius Canonicum* 58 (1989), p. 475; *Comm* 13 (1981), pp. 281 and 282; 14 (1982), p. 225.

11. Cf. CBS, *Ritual del matrimonio*, cit., prenot. 67.

and churches (c. 1188 § 1 and § 2,1° *CIC*/1917). The concept of oratory is similar to that of the semi-public oratory (c. 1188 § 2,2° *CIC*/1917), and private oratories are called private chapels. The category of churches or oratories includes sanctuaries (c. 1230), cathedrals or hermitages, and churches or oratories of religious communities, if permission is obtained from the competent superior.

Neither the *CIC*/1917 nor the *CIC* specifies what reasons could justify celebration outside of the parish church. Therefore, the local ordinary or the parish priest is to determine the appropriateness of granting the permission. Nevertheless, within the broad spirit favoring the free choice characterizing this provision, some "minimum restrictive criteria" are imposed for the celebration of marriages in churches with which the parties have no connection.[12] In this regard, the Spanish Bishops' Conference recommends dissuading spouses from choosing to marry in a certain place for reasons of vain ostentation, or economic or other unjustifiable reasons.[13] Some Spanish dioceses have specific norms in this regard, specifying "that it should not be difficult to recognize reasons of devotion or family considerations that at times cause the faithful to celebrate their marriages in Churches other than the temple of their parish. Each diocese should develop criteria and norms for these cases in connection with the customs and peculiarities of each of them. The agents of pastoral activity positively avoid having possible abuses be consolidated or established in this area."[14]

Through these restrictions, it is a question of ensuring that the celebrations of the sacrament not become trivialized. In addition, it is an attempt to guarantee that the couple enter marriage with due preparation.[15] The particular legislation of the Spanish dioceses stresses certain

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12. Cf. *Normas diocesanas para la catequesis y celebración del sacramento del matrimonio del Obispado de Salamanca,* 1979, no. 8: "It is pressing that all rectors of non-parochial churches and those parish priests in whose churches, according to custom, celebrate marriages whose parties have no tie with them, carry out the existing norms and only for very special reasons (not for ostentation, nor novelty, nor considerations of luxury) accept from outside the parish spouses who have no tie with the community"; *Normas diocesanas para la catequesis y celebración del sacramento del matrimonio del Obispado de Badajoz,* 1983, no. 24: " In those exceptions contemplated by the legislation of the Church, a restrictive criterion is employed, so as not to offend the sensibility of the faithful." p. 492; cf. "Orientacions sobre la celebració del matrimoni en esglesias no parroquials," no. 10, in *Bulletí de l'Arquebisbat de Barcelona* 124 (1984), p. 67.

13. Cf. CBS, *Ritual del matrimonio,* cit., prenot. 68, 69. In the exact same sense: *Decreto de promulgación del Directorio para la preparación y celebración del matrimonio de la Provincia eclesiástica de Granada,* cit., no. IV, 4; *Decreto de promulgación del Directorio de Pastoral sacramental del Obispado de Calahorra-Logroño,* cit., no. 185; *Decreto de promulgación del Directorio para la preparación y celebración del matrimonio del Obispado de Salamanca,* cit., no. 8.

14. "Decreto de promulgación del Directorio para la preparación y celebración del matrimonio de la Provincia eclesiástica de Granada," cit., no. IV, 4.

15. Cf. OCM (1990), *praenot.,* 23: "It is agreed that the same presbyter prepares the spouses, says the homily, receives their consent and celebrates the mass."

particular restrictions.[16] For example, in the Ecclesiastical Province of Oviedo, it is indicated: "In any event no priest should carry out the marriage of faithful from other parishes without having a *letter of introduction* from the respective parish or parishes certifying that the criteria and provision of this Directory have been adequately complied with. These provisions must be taken into account by Chaplains of the Sanctuaries and the Rectors of the non-parish Churches."[17]

Therefore, the exceptional nature that must characterize the celebration of marriage outside of the parish church calls for the intervention of the local ordinary or parish priest. The permission granted should not be confused with delegation. While delegation is required for the valid celebration of marriage and granted to the priest who shall attend for the parish priest of the place where the spouses choose to celebrate it, the permission is required only for the licit celebration of the marriage in a place other than one's own and is granted by the parish priest or the proper ordinary. The delegation by the parish priest or by the local ordinary will only be necessary to validly carry out the marriage if the church or oratory is located outside of the territory of the ordinary or of the parish priest.[18]

The competencies of the ordinary and the parish priest in this regard are cumulative and, when the Code positively allows a thing, no authority other than the Holy See can prohibit it, unless the Holy See gives other superiors the faculty for it. Nevertheless, local ordinaries can prohibit marriages in lawfully-constituted oratories, because according to c. 1225, in oratories, "all celebrations may take place ... apart from those which are excluded by the law, by a provision of the local ordinary or by liturgical laws."[19]

16. Cf. "Decreto de promulgación del Directorio de Pastoral sacramental del Obispado de Calahorra-Logroño," cit., no. 182: "The same priests ought to guarantee the adequate preparation of the parties in such a way that does not concede them to those who have not the proper preparation"; "Normas diocesanas para la catequesis y celebración del sacramento del matrimonio en el Arzopispado de Burgos," in *BO del Arzobispado de Burgos*, 1986, nos. 36 and 37, 130 (1987), pp. 39, 40: "No priest should assist in a marriage of the faithful that proceeds in another parish without having a card of presentation of the parish or parishes in question which certifies that the diocesan norms for preparation and other juridic requirements have been completed. If this preparation has not been completed, the priest of the parish in question or the priest who is presiding will carry it through. Attention is called in this sense to those rectors of non-parochial churches and the guardians of sanctuaries or temples where there are frequent nuptial celebrations. "

17. "Directorio Pastoral para la celebración y preparación del Matrimonio de la Provincia Eclesiástica de Oviedo," 1982, no. VI, 7, in *BO de la Diócesis de Oviedo* I (1982), p. 404.

18. Cf. F. AZNAR GIL, *El nuevo derecho...*, cit., p. 441.

19. "La autorización la otorga el Ordinario a propuesta de los párrocos, que lo harán conjuntamente después de estudiar las exigencias de la pastoral de la ciudad" ("Decreto de promulgación del Directorio de Pastoral sacramental del Obispado de Calahorra-Logroño," cit., no. 183); in an identical sense cf. "Instrucción de la Vicaria general del Arzobispado de Valladolid acerca de la celebración de bodas fuera de la propia parroquia y en templo no parroquial," November 1, 1991, in *BO del Arzobispado de Valladolid*, 11 (1991), p. 601. Cf. F. BLANCO NÁJERA, *El Código de Derecho canónico*, II, Cádiz 1945, p. 358.

A different issue concerns marriages celebrated in a private chapel. In these situations, under no circumstances may the parish priest authorize the marriage. Only the local ordinary is competent to grant this authorization (cc. 1226 and 1228). These phenomena would be included in c. 1118 § 2.

In order to celebrate a marriage in a church or oratory that is not a parish church or oratory, outside the territory of the proper parish, is the permission granted by the proper parish priest referred to in c. 1115 sufficient, or is permission from the local parish priest *ad quem* necessary? The Code does not offer any criterion allowing a resolution of the doubt. Therefore, it devolves upon particular law to determine how to proceed.[20]

Any expenses incurred by these churches in celebrating these marriages shall be determined at the discretion of the respective parish priests or rectors. The liturgical service will only be free when the marriage takes place in the proper parish church.[21]

2. Marriages between Catholics and mixed marriages may be celebrated elsewhere, if it is suitable or advisable (§ 2), with permission from the local ordinary.

The Code has simplified this canon to a large extent, omitting the mention made by c. 1109 § 2 of the *CIC*/1917 regarding the celebration of marriage in private homes and churches or oratories of the seminaries or the religious. In these cases, the granting of permission by the ordinary was conditional on the exceptional nature or urgency of the case, existence of a just and reasonable cause (e.g., due to the lack of another church where the marriage may be held or because it is impossible to go there, or because the chaplain was at the same time the parish priest and, if the marriage was held in the parish, the private community of the Mass would be seen that day). In addition, it was required that appropriate precautionary measures be taken so that the ceremony not spiritually prejudice or harm

20. "In the archdiocese of Barcelona the priest of whom it is said *Orientacions sobre la celebració del matrimoni en esglesias no parroquials* appears to be the same parish priest of one of the parties" cf. "Orientacions...," cit., no. 10, and also in *Informació a les parelles que es casen fora de la pròpia parroquia* (Vicariat General), ibid., p. 324. At times, the diocesan norms do not bother defining these points of procedure, simply establishing instead that the parish priest has instructed the couple that "si el matrimonio ha de celebrarse en otra parroquia, dará la debida licencia a los novios y enviará al párroco del lugar donde hayan de casarse el resultado positivo del expediente y todos los datos necesarios para su inscripción y notificación al Registro civil," "Directorio para la Pastoral del matrimonio en la diócesis de Cuenca," in *B.O. del Obispado de Cuenca*, 9 (1985), p. 98, 10ª disposición (L.M. GARCÍA, "La función del párroco en la preparación del matrimonio," in *Ius Canonicum* 58 (1989), p. 539).

21. Cf. "Decreto de promulgación del Directorio de Pastoral sacramental del Obispado de Calahorra-Logroño," cit., no. 183; "Instrucción de la Vicaria general del Arzobispado de Valladolid...," cit., p. 601.

the young seminarians or religious.[22] Presently, some of these cases are included in the "oratories" mentioned in § 1 of c. 1118

Canon 1118 only requires that the place be suitable. Private homes are not excluded[23] and celebrations in non-Catholic churches or chapels mentioned in c. 933 under the term *temples* are included in this section. Moreover, for the granting of permission, a grave reason is no longer required. It is left to the discretion of the local ordinary to grant or deny authorization for the celebration of marriage outside a sacred place.[24]

3. Marriages involving a non-baptized party may be celebrated in a church or in another suitable place, and no permission is required.[25] In principle, according to the *ratio legis* of this canon, the celebration must take place in the parish church of the Catholic party; however, this is not compulsory, so any church may be selected for the celebration.

The wording of this norm is more positive than the parallel canon in the *CIC*/1917 (c. 1109 § 3). The current norm is broad and generous enough to allow its adaptation to the needs of the faithful and to fruitful matrimonial pastoral activity.[26] Nonetheless, some authors believe that the indeterminate nature of the provision leads one to believe in the need to have the issue regulated by particular law or a decision of the ordinary in each case.[27]

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22. Cf. F. Blanco Nájera, *El código de derecho canónic,* (Cádiz 1945), p. 367.
23. Cf. *Comm* (1978), p. 104, c. 329 §2.
24. Cf. ibid. The new *Rite of Marriage* established that "Among peoples where the marriage ceremonies customarily take place in the home, sometimes over a period of several days, their customs should be adapted to the Christian spirit and to the liturgy. In such cases the conference of bishops, according to the pastoral needs of the people, may allow the sacramental rite to be celebrated in the home" (OCM (1990), *praenot.*, no. 18).
25. Cf. *Comm* (1978), p. 237, c. 1073 §1.
26. As *MM* had pointed out, "the canonical discipline on mixed marriages cannot be uniform and that it must be adapted to the various cases in what pertains to the juridical form of contracting marriage, its liturgical celebration, and, finally, the pastoral care to be given to the married people, and the children of the marriage, according to the distinct circumstances of the married people and the differing degrees of their ecclesiastical communion." Cf. F. Aznar Gil, *El nuevo derecho matrimonial*, cit., p. 442.
27. Cf. A. Bernárdez Cantón, *Compendio de Derecho Matrimonial canónico* (Madrid 1988), p. 203. The CBS, in the *Orientaciones para la celebración de matrimonios entre cat ólicos y musulmanes en España,* March 1988, no. 5, reproduces c. 1118 §3 when referring to the canonical celebration of these marriages.

1119 **Extra casum necessitatis, in matrimonii celebratione serventur ritus in libris liturgicis, ab Ecclesia probatis, praescripti aut legitimis consuetudinibus recepti.**

Apart from a case of necessity, in the celebration of marriage those rites are to be observed which are prescribed in the liturgical books approved by the Church, or which are acknowledged by lawful custom.

SOURCES: c. 1100; *SC* 78; SCR Resp. V, nov. 6, 1925 (*AAS* 18 [1926] 22–23)

CROSS REFERENCES: cc. 2, 834, 837, 838, 841, 844, 846, 1063 § 3, 1127 § 3, 1068, 1116 § 1

COMMENTARY

Ana María Vega

Christian marriage, like all the sacraments, is a liturgical act glorifying God in Christ and in the Church.[1] For this reason, the magisterium has insisted that Christian marriage normally demands a liturgical celebration that expresses the ecclesial and sacramental nature of the conjugal covenant between baptized persons (*FC* 67; c. 1063 § 3). John Paul II has stressed the demands derived from the spiritual riches contained in every matrimonial liturgical celebration. Because marriage is a sacramental gesture of sanctification, it demands that the celebration be valid, appropriate and fruitful. Since it is a symbol, the celebration must constitute a proclamation of the word of God and a profession of faith of the community of believers. Since it is a sacramental gesture of the Church, the celebration must be binding on the community through full, active, and conscious participation (cf. *FC* 67).

Almost without modifying what was provided by the *CIC*/1917 (c. 1100) in this regard, c. 1119 discusses the liturgical form of marriage. It establishes the obligation to observe the liturgical rites lawfully approved by the ecclesiastical authority or introduced by lawful customs. It is worth noting that this norm contains a formal order to observe the norms contained in liturgical books,[2] to the extent that their observance is obligatory for liceity, unless it is a case of urgent necessity. This demonstrates that, in the celebration of marriage, what concerns the liturgical form and what concerns the canonical form cannot be entirely separated.

1. Cf. *FC* 56; CCE, 1631.
2. *Comm* 8 (1976), pp. 66–68.

Taking into account the matrimonial liturgical norms,[3] the 1990 OCM provides the following:

a) In the case of marriage between two Catholics, the celebration will normally take place during Mass.[4] In this celebration, there are several elements, including the liturgy of the Word, the consent of the parties, the prayers in which God's blessing on the husband and wife is invoked, and the Eucharistic communion of both spouses. To this may be added the blessing and imposition of the rings, the blessing of the coins and the recitation of some prayers.[5]

b) In marriages between a Catholic and a baptized non-Catholic, it should be determined whether the non-Catholic spouse is an Eastern non-Catholic or a member of another Church or ecclesial community. In the first case, the marriage may be celebrated during Mass, and the Eastern non-Catholic spouse can be admitted to Eucharistic communion.[6] In the second case, the celebration of the marriage will normally take place outside of the Mass, in the structure of a celebration of the Word.[7] In some cases, the local ordinary may admit permit a celebration during Mass, observing c. 844 on *communicatio in sacris.*[8]

c) In the case of a marriage between a Catholic and a non-baptized person, the celebration will take place outside of Mass, because the celebration of the Eucharist expresses the fullness of profession of faith and ecclesial communion.[9]

In special situations (e.g., for catechumens when they marry each other or a non-baptized party), it may be advisable to celebrate the marriage through a special rite[10] or within the liturgy of the Word. The celebration of liturgical ceremonies is not allowed for persons who seek to establish an irregular union, especially the divorced or remarried (*FC* 84).[11]

This canon, by virtue of the provisions of *SC* (nos. 37–40, 63b), also contemplates the possibility of adapting the Roman Ritual to the customs and needs of each region.[12] The Code addresses this in c. 1120, which has no precedent in the *CIC*/1917.

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3. Cf. *SC*, 77–78 and *Motu proprio Sacram Liturgiam: AAS* 56 (1964), p. 119; *Instr. para la aplicación de la Const. sobre Sagrada Liturgia*, October 26, 1964, in *AAS*, 56 (1964), p. 142; *FC* 57.
4. Cf. CCE, 1621; *FC* 57; OCM (1990), *praenot.*, 29.
5. Cf. OCM (1990), *praenot.*, 35, 38; CBS, *Ritual del matrimonio* (Madrid 1971), prenot. 42–62.
6. Cf. OCM (1990), *praenot.*, 45–78.
7. Ibid., 79–117.
8. Cf. OCM (1990), *praenot.*, 36; CBS, *Ritual del matrimonio*, cit., prenot. 18, 57; *MM*, 11; CBS, *Normas sobre los matrimonios mixtos*, January 25, 1971, no. 7.
9. Cf. OCM (1990), *praenot.*, 18, 57.
10. Ibid., 36, 152–177.
11. Cf. F.R. AZNAR GIL, *Cohabitación civil, divorciados casados de nuevo* (Salamanca 1980), pp. 84–100.
12. Cf. OCM (1990), *praenot.*, 39–44.

The liturgical form of marriage described by OCM consists of the rites and ceremonies prescribed by the Church, which accompany the giving of consent through the nuptial blessing.[13] In the *CIC*/1917, the distinction between these two elements was much more evident than at present, since the rite of celebration, barring exceptions, was obligatory, while the blessing could only be imparted within the votive Mass of the spouses. It was even prohibited on holidays.[14] At present, the blessing constitutes one of the elements of the rite of the celebration, which justifies the disappearance of c. 1101 *CIC*/1917.[15]

The nucleus of the marriage ritual is the active intervention of the attending priest, who asks for and receives the consent of the parties in the name of the Church,[16] according to the rites prescribed by the liturgical books. This act of acknowledgment and receipt of matrimonial consent by the priest is a constitutive element of the marriage ritual; therefore, it must be present in any case (c. 1120). Nevertheless, the new *Ritual of Marriage* does not require a given form of asking for and receiving consent for validity. It is sufficient for there to be active participation by the attending minister, who asks questions regarding the consent of the betrothed parties.[17] It is advisable to specify the juridical and sacramental scope of this intervention, because it should not be confused with that of the ministers of the sacrament of marriage, who in the Latin rite are always the parties.[18]

Both the role assumed by the parties in the sacramental celebration of marriage and the meaning and juridical efficacy of the liturgical form deserve attention, because they have largely oriented the pastoral and disciplinary norms of many particular churches on marriage preparation.[19]

The peculiarity of the sacrament of marriage is that "it is the sacrament of something that was part of the very economy of creation; it is the very conjugal covenant instituted by the Creator *in the beginning*" (*FC* 68). That peculiarity of marriage based on the similarity between the marriage in the beginning and the sacrament of marriage explains the non-essential need of the sacred rites for "making" of this sacrament. The liturgical framework is not identified with the celebration of marriage, but is simply that: the liturgical *framework* in which is placed the celebration of marriage or the conjugal covenant between baptized persons.[20] John

13. Cf. OCM (1990), *praenot.*, 35, 38, 41; CBS, *Ritual del matrimonio*, cit., prenot. 42–56.
14. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho Matrimonial canónico* (Madrid 1988), p. 201.
15. Cf. *Instr. para la aplicación de la Const. S.C.*, cit., no. 74; CCE, 1624, 1630.
16. Cf. c. 1108 §2; CCE, 1630.
17. Cf. OCM (1990), *praenot.*, 41; CBS, *Ritual del matrimonio*, cit., prenot. 47, 48, 50.
18. Cf. CCE, 1623.
19. Cf. F.R. AZNAR GIL, *La preparación para el matrimonio: principios y normas canónica*, (Salamanca 1986).
20. Cf. T. RINCÓN, "El requisito de la fe personal para la conclusión del pacto conyugal entre bautizados según la Exhort. Apost. Familiaris Consortio," in *Ius Canonicum* 44 (1983), p. 217.

Paul II referred to this when he stated that "Christian marriage normally requires a liturgical celebration expressing in social and community form the essentially ecclesial and sacramental nature of the conjugal covenant between baptized persons" (*FC* 67).

As indicated by Rincón-Pérez, unlike the other sacraments, the liturgical action in marriage has only a declarative and not a constitutive function. The constitutive factor lies in the conjugal covenant between the baptized persons. The covenant is not surrounded by a juridical framework suitable to be holy, sacred or sacramental, but for what it is in itself and would essentially be regardless of its mode of celebration, although the Church has tried to insert into the liturgy the celebration of marriage, to better express what is essentially involved in the conjugal covenant between baptized persons.[21]

Therefore, the *liturgical form* cannot be confused with the *juridical form*. The first is required *ad liceitatem*, the second *ad validitatem*. Nevertheless, marriage is not a sacrament because it is celebrated canonically, nor is that form a sacramental rite. Rather, it is a juridical formalization, based on strictly juridical principles of certainty and security. The fact that it is actually involved with liturgical ceremonies, or that the qualified witness is a sacred minister, is not owing to substantial reasons of form or of the sacramental nature, but to reasons of advisability and consistency.[22] In fact, in marriage, the essentially ecclesial and sacramental nature comes with the conjugal covenant due to the act of celebration between baptized persons. Another thing is the advisability that this sacramental reality be manifested in the framework of a liturgical celebration. At the same time, the liturgical form helps highlight the public nature of marriage and guarantee its public and valid celebration, with the relevant juridical and social effects derived therefrom.[23]

However, the fact that the liturgical form does not affect the validity of marriage does not mean that it lacks juridical value, because, unless

21. Ibid.

22. Cf. J. HERVADA-P. LOMBARDÍA, *El derecho del pueblo de Dios. III. Derecho matrimonial* (Pamplona 1973), p. 272.

23. Cf. K. RITCHER, "La celebración litúrgica del matrimonio: su problemática frente a la evolución de las ideas teológicas y jurídicas relativas al matrimonio," in *Concilium* 87 (1973); C. VOGUEL, "Le rôle du liturgie dans la formation du lien conjugal," in *Revue de Droit Canonique* 30 (1980), pp. 7–27; I.R. FALSIN, "La celebrazione del matrimonio secondo il Concilio Vaticano II," in *Enciclopedia del matrimonio* (Brescia 1965), pp. 697–711; P. BARBERI, "Linee di sviluppo della recente reflessione teologica sulla celebrazione del matrimonio," in *Ephemerides Liturgicae* 93 (1979), pp. 258–315; F. BROVELLI, "La celebrazione del matrimonio. Analisi del nuovo rituale," in *Rivista Liturgica* 63 (1976), pp. 476–499; P. FARNES, "El ritual del matrimonio: reflexiones sobre su correcta utilización litúrgico-pastoral," in *Phase* 15 (1975), pp. 93–104; T. RINCÓN, "Preparación para el matrimonio-sacramento y 'ius connubii,'" in *El matrimonio. Cuestiones de derecho administrativo canónico* (Salamanca 1990), p. 73; F.R. AZNAR GIL, *El nuevo derecho matrimonial canónico, 2ª ed.*, (Salamanca 1985), p. 439.

some circumstance prevents it, it is a right of the parties, and consequently a duty of the parish priest, that those who wish to enter into marriage must do so through the liturgical celebration. This is a general duty of every ecclesial community.[24]

The peculiar nature of the sacrament of marriage poses another question, related to the role assumed by the betrothed parties as ministers in the sacramental celebration of marriage. Following the opinion maintained by Hervada, it seems unclear to state that the action of the parties can be described as the making and administration of the sacrament.[25] In fact, the other sacraments need the making of the rite, because that rite is not the ordinary action of daily life. They are specifically ecclesial actions, given their external form from ordinary actions, without properly being such. That is why the action (proximate matter) must necessarily be joined by a specifying factor (the form), which manifests the general religious sense and the specific efficacy of the total rite, which factor in the sacraments as the words (*verba*). However, marriage is not a sacred action in the form of the reality of ordinary life; it is that same ordinary reality that *ex se* has become a sacrament. Nor is the sacrament something added to ordinary reality; it is the same ordinary reality that has been sanctified by Christ. That is why there are no specific words showing the grace conferred, nor the sanctification, nor its sacramental nature; that is why in the ritual *ad validitatem* no concrete form of giving and receiving matrimonial consent is required. For these reasons, the making of the sacrament does not exist in marriage in the sense in which that expression is used for other sacraments. It only occurs in the sense that the parties give existence to the marriage.[26] Nor is there administration in the sense used by the other sacraments, because, in those cases, the rite and the sacramental reality are external to the subject. That is not the case with marriage, because there is no rite strictly speaking nor is it external to the subject (the manifestation of the consent is its action); nor is it a transferable reality, because the only thing handed over is the betrothed party.[27]

These premises lead to the conclusion, following the reasoning of Hervada, that, inasmuch as sacramental marriage in and of itself, by the will of Christ, and in that the parties themselves are the ministers, there is no basis for the opinion of those who believe that only Christians who are responsible and conscious of their faith should be allowed in the sacrament of marriage.[28]

24. Cf. *SC,* 14; OCM (1990), *praenot.*, 36; L.M. GARCÍA, "La función del párroco en la preparación del matrimonio," in *Ius Canonicum* 58 (1989), p. 528.
25. Cf. J. HERVADA-P. LOMBARDÍA, *El derecho del pueblo de Dios...*, cit., p. 165.
26. Cf. J. HERVADA-P. LOMBARDÍA, *El derecho del pueblo de Dios...*, cit., p. 165.
27. Ibid.
28. Ibid.

These and other similar circumstances justified as a clear and urgent necessity the revision of the norms that referred to the pastoral preparation for a valid, lawful, and fruitful celebration of the sacrament of marriage. The liturgical reform that took place because of Vatican Council II stressed this issue[29] and it was echoed by the rituals in their vernacular versions.[30]

The problem, as noted by Rincón-Pérez, is posed by the progressive slipping that has been occurring in recent years, on the part of doctrine as well as pastoral practice brought about by certain particular legislation, with a difficult juridical configuration.[31] This explains, as stressed by Aznar Gil, why the general tendency is ambiguity in indicating how obligatory it is, the confusion of theological and legal language, the mixing of various issues or the elevation to a thesis of what is merely a working hypothesis or a theological opinion.[32]

John Paul II nips in the bud matrimonial celebrations carried out "as a mere social act" and makes clear that the celebration of marriage "must also be a 'profession of faith'" within and with the Church, as a community of believers" (*FC* 51). Nevertheless, these words do not seek to establish the personal faith of the betrothed parties as an essential requirement for the valid formulation of the conjugal covenant. The Pope's answer is clear: as a rule, no one who requests it and is willing should be excluded from the celebration of the sacrament of marriage. Self-exclusion would only be allowed in the event that the one asking to be married before the Church does not want to assume the matrimonial reality as designed by God the Creator and Redeemer (cf. *FC* 68).

Taking into account these principles, some episcopal conferences insist on the need for "a catechesis designed for a refresher course in the faith and conscious preparation for marriage, along with a liturgical catechesis on the celebration of the sacrament."[33] In any event, there cannot be an outright rejection; then it would be an unlawful but not invalid celebration,[34] given that the sacramental nature depends on Christ, not on the faith of the minister or his training or holiness.

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29. Cf. *SC*, 77.
30. Cf. CBS, *Ritual del matrimonio*, cit., prenot. 21–26.
31. Cf. T. Rincón, "El requisito de la fe personal...," cit., p. 206.
32. Cf. F.R. Aznar Gil, *La preparación para el matrimonio: principios y normas canónica* (Salamanca 1986), p. 51.
33. CBS, *Ritual del matrimonio*, cit., prenot. 23. Cf. Assemblée Plénière de l'Épiscopat Français, "Note sur la pastorale des fiancés," November, 1969, nos. 11–16, in *La Documentation Catholique* 47 (1969), pp. 1075–1077; Évêques de Belgique, "Note pastorale concernant le mariage de catholiques non-pratiquants ou n'ayant pas la foi chrétienne," September 25, 1977, nos. 55, 92–95, in *La Documentation Catholique* 49 (1972), pp. 979–982; Évêques de Suisse Romande, "La pastorale du mariage. Situations particulières. Directives," February 1, 1979, in *La Documentation Catholique* 76 (1979), pp. 343.
34. CBS, *Ritual del matrimonio*, cit., prenot. 12: "el sacramento del matrimonio supone la fe, y sin fe no es lícito celebrarlo."

Pursuant to these general principles, the Code makes the discipline more flexible, foreseeing for cases of necessity (danger of death pursuant to c. 1068, marriage entered into according to c. 1116 § 1, or urgency for other reasons) a reduction of the matrimonial rite to its essential part. Even in situations of non-believing or non-practicing baptized persons, two possibilities are contemplated. The first would consist of limiting the religious rite to the essential elements of the celebration, avoiding the aspects that are inconsistent with the situation of the spouses. It would become a rite similar to the one established for the celebration of mixed marriages. The second possibility would consist of exempting them from the canonical form of marriage, explaining that in this case it would not be a problem of the sacramental nature but of actual formalization of the conjugal covenant. Lastly, for those who, being baptized, expressly reject the sacramental value of the marriage or seek to exclude from its life manifestation the essential properties of marriage, but nonetheless request a religious celebration, it must be denied them: "However, when in spite of all efforts, engaged couples show that they reject explicitly and formally what the Church intends to do when the marriage of baptized persons is celebrated, the pastor of souls cannot admit them to the celebration of marriage. In spite of his reluctance to do so, he has the duty to take note of the situation and to make it clear to those concerned that, in these circumstances, it is not the Church that is placing an obstacle in the way of the celebration that they are asking for, but themselves" (*FC* 68). This solution does not entail denying them the sacrament indefinitely, but only deferring its celebration until they realize the religious and ecclesial dimension of the matrimonial union.

1120 **Episcoporum conferentia exarare potest ritum proprium matrimonii, a Sancta Sede recognoscendum, congruentem locorum et populorum usibus ad spiritum christianum aptatis, firma tamen lege ut assistens matrimonio praesens requirat manifestationem consensus contrahentium eamque recipiat.**

The Bishops' Conference can draw up its own rite of marriage, to be reviewed by the Holy See, in keeping with the usage of the place and people, adapting these to the Christian spirit; however the law must be observed which requires that the person assisting at the marriage, being present, is to ask for and receive the expression of the contracting parties' consent.

SOURCES: *SC* 77, 78; OCM 17

CROSS REFERENCES: cc. 455, 838 § 3, 841, 844, 846, 1108 § 2

COMMENTARY

Ana María Vega

"In the Liturgy, especially in that of the sacraments, there is an *immutable part*, in that it is a divine institution, of which the Church is the guardian, and *parts that are subject to change*, which it has the power, and at times even the duty to adapt to the cultures of newly-evangelized peoples (cf. *SC* 21)."[1] These words of the *CCC* frame the content of this canon.

This norm, absent from the *CIC*/1917, was the result of a division of c. 1119, which took place in the process of the final revision of the 1982 *Schema novissimum*, which introduced some linguistic and stylistic changes, as well as technical improvements.

The council deliberations were taken into account in its drafting, pursuant to which two basic points are indicated in this canon. On the one hand, it allows episcopal conferences to officially establish a particular rite, authorized by the Apostolic See. On the other, it insists on the need for the person attending the marriage on behalf of the Church to ask for and receive the expression of the consent of the contracting parties, who are the ministers and receivers of the sacrament.

1. Cf. CCE, 1205.

The first of these points demonstrates once more the stimulus given by Vatican Council II to the principle of subordination. As indicated by the Code in its Preface, "in virtue of this principle and provided that legislative unity and universal and general Law are respected, provision for the interests of individual institutes by particular Laws and a healthy autonomy of particular executive power is recognized as proper and necessary ... Based on this principle the new Code entrusts to particular Laws or to executive power all that is not required for the unity of the discipline of the universal Church, so as to suitably provide for a healthy "decentralization," that is to say, while avoiding the danger of disaggregation or the establishment of national Churches."[2]

True to the council doctrine on episcopal ministry, the new Code has applied this principle of decentralization in the marriage norms referring to marriage, by granting broad authority to episcopal conferences and local ordinaries to adapt matrimonial law to the particular circumstances of each nation or cultural area.[3]

The granting of authority to the episcopal conference to develop a proper rite of marriage also stresses the distinct normative spheres that the Code establishes in the regulation of the sacraments. Together with those organs that enjoy exclusive competence to approve and define everything concerning the necessary elements for the validity of the sacraments (the Roman Pontiff and the ecumenical council), there are others (bishop and bishops' conferences) the actions of which concern spheres referring to the licit administration of the sacraments and the elements that contribute to their orderly celebration, without affecting the validity of the sacrament.

Nevertheless, the authority granted to episcopal conferences is limited by the prior acknowledgment of this rite by the Holy See, as well as the minimum formal requirements of the substantial juridical form of canonical marriage. The creation in the *CIC* of the first of these limits is found in the wording of the canon, which speaks of *recognoscere*, because it is an absolutely necessary act of the power of governance, which can also impose substantial modifications to the law or decree presented for its *recognitio*.

The second of these limits, that is, the requesting and receiving of the contracting parties' consent by the qualified witness, must be maintained, given that it constitutes the unchangeable part of the liturgy of the sacrament of marriage, of which the Church is the guardian.[4] Therefore, the adaptations of the ritual to a given culture can only affect those parts that are subject to change. For this, one must consider the factors of im-

2. *CIC, Prefacio.*
3. Cf. F.R. AZNAR GIL, *El nuevo derecho matrimonial canónico*, 2nd ed. (Salamanca 1985), p. 51.
4. Cf. CCE, 1205.

mediacy with regard to the problems, of experience with regard to the particular characteristics of the Christian life of a given nation or territory and the appropriate unit of criterion and action with respect to the suitable solution of certain pastoral phenomena of common interest, with the substance of the precept of universal law remaining constant.[5]

Familiaris Consortio specifies that "it is also for them ... to include in the liturgical celebration such elements proper to each culture which serve to express more clearly the profound human and religious significance of the marriage contract, provided that such elements contain nothing that is not in harmony with Christian faith and morality" (*FC* 67). In this regard, the *Ordo celebrandi Matrimonium* establishes that in the uses of matrimonial celebrations of newly evangelized peoples, "one must comprehensively consider anything that is reasonable and not inseparably intermixed with superstitions and errors."[6]

Through this canon, the universal legislator gives episcopal conferences competence to develop a rite of marriage "consistent with the usage of the places and of the peoples," valuing the knowledge that the conferences will have of the customs of the respective nation or territory. But at the same time, the Magisterium has not failed to insist, following these principles, that "it is true that in liturgical law there is clearly an influence from the mentalities and traditions of the peoples and that this point has been noted in the Constitution *Sacrosanctum Concilium*, nos. 37–39; but that does not mean that each celebrant may act with total freedom of action ..., but one must always know to whom the Church has granted the authority to make the lawful adaptations."[7]

The adaptations entrusted to episcopal conferences are regulated in the 1990 *Ordo celebrandi Matrimonium*, in forewords 39–44. They describe their competencies in this regard, such as defining those adaptations, adapting and completing the *praenotanda* of the Roman Ritual, preparing the translations of the texts and ordering the materials in the manner most suitable for pastoral use.[8]

In conclusion, the exercise of competence over liturgical matters is optional. It has not always been exercised, because many countries already have suitable rites. Others have for the moment waived the right to exercise it (Malta, Panama), or redirect it to the rituals already developed by the episcopal conference (Dominican Republic, El Salvador, Venezuela), or even entrust to some organs the development and proposal of the ritual (Brazil, Ecuador, Peru).[9] In Spain, the following rituals have been

5. Cf. J. CALVO, "Las competencias de las Conferencias Episcopales y del Obispo diocesano en relación con el 'munus sanctificandi,'" in *Ius Canonicum* 48 (1984), p. 662.

6. OCM (1990), *praenot.*, 43.

7. SRC, *Consilium Ad Exsequendam Const. de Sacra liturgia*, June 30, 1965.

8. Cf. OCM (1990), *praenot.*, 40.

9. Cf. J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali complementare al CIC* (Milan 1990), p. 26.

approved by the Episcopal Commission on Liturgy: the *Ritual of Marriage* (Madrid, 1971), in force for all Spain, except the ecclesiastical provinces of Tarragona (*Ritual of Marriage*,Barcelona, 1971), and of Santiago de Compostela (*Ritual do Matrimonio*, Coruna, 1980), which have their own ritual to which are referred all related issues in the liturgical celebration. Pursuant to c. 2, these norms "remain in force, except when one of them conflicts with the canons of the Code."[10]

The *Ritual of Marriage* promulgated by the Spanish Bishops' Conference establishes three types of celebrations: celebration of marriage within Mass (recommended for marriages between Catholics or between a Catholic and another baptized person),[11] celebration of marriage outside Mass (recommended for Catholics classified as "non-believers" or "non-practicing" and for those described in c. 1071 § 1,4°) and celebration of marriage between a Catholic and a non-baptized person. With respect to the time of celebration of marriage, the *Ritual* establishes that all days are appropriate except the Easter triduum.[12]

10. Cf. SCSDW, "Variationes in novas editiones librorum liturgicorum ad normam Codicis Iuris Canonici nuper promulgati introducendae," September 12, 1983, in *Notitiae* 206 (1983), pp. 540–545.
11. CBS, *Normas sobre Matrimonios mixtos*, January 25, 1971, no. 7.
12. CBS, *Ritual del matrimonio* (Madrid 1971), prenot. 63–64.

1121 **§ 1. Celebrato matrimonio, parochus loci celebrationis vel qui eius vices gerit, etsi neuter eidem astiterit, quam primum adnotet in matrimoniorum regestis nomina coniugum, assistentis ac testium, locum et diem celebrationis matrimonii, iuxta modum ab Episcoporum conferentia aut ab Episcopo dioecesano praescriptum.**

§ 2. Quoties matrimonium ad normam can. 1116 contrahitur, sacerdos vel diaconus, si celebrationi adfuerit, secus testes tenentur in solidum cum contrahentibus parochum aut Ordinarium loci de inito coniugio quam primum certiorem reddere.

§ 3. Ad matrimonium quod attinet cum dispensatione a forma canonica contractum, loci Ordinarius, qui dispensationem concessit, curet ut inscribatur dispensatio et celebratio in libro matrimoniorum tum curiae tum paroeciae propriae partis catholicae, cuius parochus inquisitiones de statu libero peregit; de celebrato matrimonio eundem Ordinarium et parochum quam primum certiorem reddere tenetur coniux catholicus, indicans etiam locum celebrationis necnon formam publicam servatam.

§ 1. As soon as possible after the celebration of marriage, the parish priest of the place of celebration or whoever takes his place, even if neither has assisted at the marriage, is to record in the marriage register the names of the spouses, of the person who assisted and of the witnesses, and the place and date of the celebration of the marriage; this is to be done in the manner prescribed by the Bishops' Conference or by the diocesan *Bishop.*

§ 2. Whenever a marriage is contracted in accordance with Can. 1116, the priest or deacon, if he was present at the celebration, is bound as soon as possible to inform the parish priest or the local Ordinary about the marriage entered into; otherwise the witnesses, jointly with the contracting parties, are so bound.

§ 3. In regard to a marriage contracted with a dispensation from the canonical form, the local Ordinary who granted the dispensation is to see to it that the dispensation and the celebration are recorded in the marriage register both of the curia, and of the proper parish of the catholic party whose parish priest carried out the inquiries concerning the freedom to marry. The catholic spouse is obliged as soon as possible to notify that same Ordinary and parish priest of the fact that the marriage was celebrated, indicating also the place of celebration and the public form which was observed.

SOURCES: § 1: c. 1103 § 1
§ 2: c. 1103 § 3
§ 3: *MM* 10

CROSS REFERENCES: cc. 2, 486 § 2, 489 § 1, 535 § 1, 535 § 2, 1059, 1079 § 1, 1079 § 2, 1081, 1127 § 2, 115, 1133, 1391, 1540 § 1, 1541, 1544–1546

COMMENTARY

Ana María Vega

I. THE RECORDING OF MARRIAGE DIRECTLY AFTER THE CEREMONY

Canons 1121–1123 regulate the canonical registration of marriage into the parish and diocesan registries. This recording is to guarantee juridical evidence of the celebration of the marriage, but it is never a condition for validity. Its efficacy is merely declarative, not constitutive of the marriage. Canon 1121 determines the various aspects concerning the recording of marriages in the registries and cc. 1222–1223 refer to the entering of the marriage in the baptism books in existence in all parishes.

The recording consists of writing down the marriage celebrated in the respective registry, with an indication of the various elements required by the canonical system. It has the force of a public ecclesiastical document (c. 1540 § 1), which attests to everything directly and mainly stated therein unless otherwise established by contrary and clear arguments (c. 1541). To have probative value, it must meet the requirements of cc. 1544–1546. Its falsification, alteration, destruction or concealment, or its use if it is a false or altered document, is subject to severe sanctions, both ecclesiastical (c. 1391) and civil (cf., for example, art. 302 of the Spanish Penal Code).[1]

1. *Marriage celebrated in ordinary canonical form (§ 1)*

It must be recorded in the book of marriages of the parish of the place where it is celebrated, as soon as possible. A proposal was rejected requiring recording in the place of the celebration of the marriage and in the place where the prenuptial investigation was carried out.[2]

1. Cf. F.R. AZNAR GIL, *El nuevo derecho matrimonial*, 2nd ed. (Salamanca 1985), p. 445.
2. Cf. *Comm* 8 (1976), pp. 68–73; 10 (1978), pp. 99–101.

This provision is taken almost verbatim from the Decree *Ne temere* (August 2, 1907), of the SCCouncil, Art. 5 § 1,[3] which substantially retained the discipline provided in Trent Conc. (sess. 24, C. *De ref. matr.*) and the *Roman Ritual* (tit. 7, c. 2, no. 6).

Unlike the *CIC*/1917, which did not specify upon whom this obligation devolved, the *CIC* establishes that the responsibility of recording devolves upon the parish priest of the place the marriage was celebrated (c. 530, c. 531 § 1), regardless of whether the proper parish priest, the ordinary, or a delegate thereof authorized it, and even if neither party had their domicile, quasi-domicile, or residence for one month in the parish. Alternatively, whoever takes his place is obligated to handle it, even if none of the previously mentioned qualified witnesses assisted at the marriage. This duty of the parish priest is justified by the fact that it is he who is constituted *a iure* as a public person to attest to the things of his office and it is he who by universal custom is considered a notary public. The assistant priest may also sign it with him.

In the case described in c. 1121 § 1, the following information must be set forth in the book of marriages, according to the method provided by the bishops' conference or the diocesan ordinary: the names of the spouses, the assisting minister, and the witnesses, the place and day of celebration and any dispensation granted. The record must contain the signatures of the spouses, the witnesses and the assisting minister.

2. *Marriage celebrated in extraordinary form (§ 2)*

This provision has its historical precedents in the Instruction of the SCPF, June 23, 1830, and the Decree *Ne temere*. Its rational basis is the need for authentic registration of the marriage when it has not occurred according to the ordinary canonical form.

The marriage referred to in this paragraph must be registered in the book of marriages of the parish of the place where the marriage is celebrated. Nevertheless, unlike the provisions of § 1, in these situations, two obligations are provided: reporting said celebration and recording the marriage contracted in this way.

The first of these obligations affects the priest or deacon present at the marriage (c. 1116 § 2). Both the contracting parties and the witnesses must report the celebration of the marriage to the parish priest and the ordinary of the place of celebration as soon as possible. Thus, it is a serious duty for every one of the obligated parties, and if one complies, the rest are free.

3. *ASS* 40 (1907), pp. 669–671.

The *CIC*/1917 (c. 1103 § 3) did not expressly mention the recipient of this communication, but made a general indication for its "notation as soon as possible in the books where it is sent." Therefore, this obligation was met by advising either the parish priest of the place of celebration or the proper parish priest or the priest of the place of baptism of the spouses. The *CIC* only requires communication to the priest of the place of celebration of the marriage, referring to c. 1122 for the entry in the book of baptisms.

The duty to record the marriage, as in the case of the marriage entered into in the ordinary form, devolves upon the parish priest of the place of celebration.

3. *Marriage celebrated with dispensation from the canonical form (§ 3)*

These phenomena were not contemplated in the *CIC*/1917. Their codification was the result of the changes and innovations introduced into the discipline of the Catholic Church on mixed marriages after the *Motu proprio Matrimonia Mixta*, of March 31, 1970.

Despite the absence of the canonical form in these marriages, the *CIC* maintains the requirement for some public form of celebration for the validity of marriage (c. 1127 § 2). For this purpose, to guarantee its public nature and juridical security, this type of marriage is also subject to recording.

In these cases, the obligation is to note the dispensation granted and the celebration of the marriage in two books of marriages: that of the curia and that of the proper parish of the Catholic party. Given that, as provided in c. 1115, there can be more than one proper parish, this canon specifies it is the one where the investigation regarding the freedom to marry was carried out. It devolves upon the local ordinary who granted the dispensation to ensure compliance with this formality, and the canon makes no mention of the parish priest in connection with this obligation.

With a marriage entered in danger of death, as foreseen in c. 1079 § 2, the parish priest, the duly delegated sacred minister and the priest or deacon who as an exception may dispense with the canonical form and assist the marriage, have the obligation to report to the ordinary (c. 1081), so the ordinary may comply with the provisions of this canon.

On the other hand, c. 1121 § 3 requires the Catholic spouse to notify the same ordinary and the parish priest of the actual celebration as soon as possible, indicating the place the marriage was entered and the form observed. This notification is usually performed by sending the marriage certificate.

For *mixed marriage* phenomena, communication of the celebration of the marriage to the minister of other non-Catholic ecclesial community is no longer required. This requirement, in force in the *Motu proprio Matrimonii mixta*,[4] was amended to achieve uniformity.[5]

Also included in c. 1121 § 3 are the marriages of Catholics celebrated with a dispensation from of the canonical form before the competent civil authority and in the legitimately prescribed civil form. These marriages must be entered in the parish book of marriages, since they are canonically valid (cf. c. 1127 § 2 in connection with c. 1121 § 3).

The norms on mixed marriages promulgated by the Spanish Bishops' Conference require that this recording be done by the "parish priest of the Catholic party in the respective book of his parish, having before him the matrimonial certificate issued by the authority of the other religion or the Civil Registry. The author of the dispensation of the impediment and the canonical form shall also be set forth."[6]

More debatable is the case of civil marriages of Catholics who have abandoned the faith through a formal act, because the duty to record the marriage in the matrimonial books of the parish depends on the prior sacramental consideration of these unions. This issue has given rise to interesting doctrinal debates in the fields of theology and canon law, which still cannot be considered definitively settled.

In cases of marriages celebrated in secret, as provided in c. 1133, the matrimonial information shall be registered in the secret archives of the curia. The recording may only pass to the parish book once it is no longer secret.

II. CIVIL EFFICACY OF THE CANONICAL RECORDS OF MARRIAGE: PARTICULAR REFERENCE TO THE PROBLEM IN SPANISH LAW

Lastly, the Church is also concerned with the civil effects of marriage (cf. *GS* 76), for which purpose, it refers to civil law in c. 1059.

The Spanish civil laws have profoundly changed the system for recognizing the civil effects of marriage. Before the reform of Family Law in 1981, there were three ordinary titles of recording of canonical marriage: the certificate of presence drawn up by the registrar or his or her delegate, the certified copy of the sacramental certificate of marriage, and the ecclesiastical certification issued by the competent authority.

4. In Spain: CBS, *Normas sobre matrimonios mixtos*, February 8, 1971, no. 10.
5. Cf. *Comm* 10 (1978), pp. 99–100.
6. CBS, *Normas sobre matrimonios mixtos*, cit., no. 11.

Subsequently, the final Protocol of the Resolution on Juridical Matters signed by the Spanish State and the Holy See in 1979 contemplates two alternative means of recording marriage in the civil Registry: presentation of the ecclesiastical certification of the marriage, which is given to the spouses immediately after the marriage is celebrated, and the certificate that the parish priest must transfer to the person in charge of the Registry within five days, in the event that it has not been recorded yet, at the request of the interested parties.

In Spain, according to current civil law, the State recognizes the civil effects of marriages celebrated according to the norms of canon law, although for their full acknowledgment, recording in the respective civil Registry is required.[7]

Despite the provisions of the Resolution, the system was subsequently changed by the reform of Family Law of 1981, which imposed new requirements. Ecclesiastical certification must state the circumstances required by the legislation of the Civil Registry and, by virtue of a unilateral interpretation of that Resolution, recording may be denied when there is evidence that the marriage is invalid pursuant to civil law.[8]

"It so happens that Art. 63 substantially alters the interpretation of the subject then given in the Resolution of 1979 (formal requirements, ecclesiastical certification is always recordable, mere presentation is sufficient). Recording is still an *act of control* regarding the conditions required by law for canonical marriage to have full civil force and effect, but it is no longer merely *declarative*, but *constitutive* of one of two aspects, the civil aspect, in which this bifrontal and foreign concept of marriage has crystallized."[9]

In this way, the nature of the civil act of recording should be considered, pursuant to current Spanish civil law, as merely declarative with respect to the marriage itself, because it does not constitute a necessary requirement for the juridical existence thereof, but rather for its publication; but it has a constitutive nature for the civil effects to be in force, because without this nature these effects cannot operate.[10]

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7. Cf. *Acuerdo sobre Asuntos Jurídicos entre la Santa Sede y el Estado Español*, ratified on January 3, 1979, art. VI.1.

8. Cf. art. 63 of the *Código Civil español*.

9. Cf. M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1990), p. 353; R. NAVARRO VALLS, "La inscripción del matrimonio en el registro civil," in *El matrimonio. Cuestiones de derecho administrativo canónico* (Salamanca 1990), pp. 181–206; idem, "Los efectos civiles del matrimonio canónico en el Acuerdo sobre Asuntos Jurídicos de 1979 entre la Santa Sede y el Estado español," in *Revista de Derecho Privado* (1980), pp. 217–244; R. DURÁN RIVACOBA, *La inscripción en el Registro Civil del matrimonio canónico* (Madrid 1988).

10. Cf. M. LÓPEZ ALARCÓN, *Sistema matrimonial concordado. Celebración y efectos, Acuerdo entre la Iglesia y España. Régimen jurídico de sus relaciones* (Madrid 1980), p. 327.

On the other hand, civil recording of a canonical marriage through the presentation of the ecclesiastical certification poses two questions: who the author of the certification is and who presents it. With respect to the first of these issues, the Resolution of 1979 established that the author of the certification could be the priest celebrating the marriage or the parish priest of the place the marriage was celebrated. In line with other authors, we tend toward the second of the two, because, according to canonical legislation, the parish priest of the place of celebration has the duty to register the marriage in the respective books of the parish registry.[11]

Greater difficulties arise with the problematic system created for the presentation of the ecclesiastical certification: who is obligated to record the marriage, the parish priest or the contracting parties? Unlike what has occurred in other countries, the Holy See has not pronounced for Spain any instruction that could give us guidance. Only the Apostolic Nunciature in Spain, concerned with effective compliance with said resolution, indicated in the Circular of July 11, 1980: "It would be seriously negligent to not comply with the provision of the final Protocol of the Resolution in connection with the parish priest's obligation to communicate within a term of five days. And that is not only due to the binding force of the covenant, but also because of the potential grave prejudice it could cause the married couple by neglecting the civil force of their marriage. By doing it (communicating with the Civil Registry), the parish priest assumes neither the reality nor the appearance of a registry function of the State, but the defense of a dogmatic value of the Church: the value of the sacrament of marriage. At the same time, he performs a service for the faithful, by attesting to the existence of a marriage."[12]

From the civil point of view, the matter is not clear either. The Spanish Civil Code omits any reference to it and on the other hand, there are only allusions in the registry norms, which provide no clarification. Thus, Art. 71 of the Law of Registries, of doubtful legal effect due to the fact that the recording procedure referred to has been derogated, imposes on the contracting parties themselves the obligation to request the recording of the canonical marriage. Neither do the norms from the General Department of Registries and Notaries shed any light on this issue.

There is also a lack of unanimity in doctrine. While one camp only considers the parish priest's obligation to request recording subsidiary,[13] another claims that it always affects him, not only when he has no

11. Cf. F.R. Aznar Gil, *El nuevo derecho*..., cit., p. 450.
12. "Circular de la Nunciatura Apostólica de Madrid a la Secretaría de la CBS," August 9, 1980, in *Ecclesia*, July 9, 1980, p. 21; Cf. Nunciatura Apostólica en España, *Circular sobre certificación del matrimonio canónico a efectos del reconocimiento civil*; CBS, Normas, February 8, 1971, nos. 10–12.
13. Cf. R. Durán Rivacoba, *La inscripción*..., cit., pp. 44ff.

evidence that the contracting parties have submitted certification of the celebration of the marriage, or when he suspects that they have not done so and are not going to.[14]

Lastly, in connection with the civil responsibility resulting from negligence in compliance with this obligation, it will only be demandable when the assisting priest or deacon, due to negligence or intent, does not issue the required ecclesiastical certification, and the contracting parties do not intervene, and, at the same time, the parish priest does not send the copy of the certificate in the established term. In this case, it is possible to demand reparation for damages against the parish priest as well as against the assistant, pursuant to Art. 1902 of the Spanish Civil Code.[15]

With respect to the civil force of these canonical marriages that have not been recorded, it is worth pointing out that the act of contracting canonical marriage determines that the spouses are married and, of course, the effects of marriage operate and are opposable, albeit not all, regardless of the registration: we would have a "juridically relevant transaction, endowed with all the potential virtual efficacy necessary to produce, once recorded, full civil force and effect."[16] Therefore, the fact that there is no recording only prevents a full acknowledgment of the civil effects, with which a part of those effects cannot operate immediately; but its nature does not vary much from a recorded marriage, especially when the problem is easily remedied. The qualified expression "full force and effect," used by the legislator, and the protection of the rights acquired in good faith by a third party, from Art. 61 of the Spanish Civil Code, of necessity lead to the conclusion that those unrecorded marriages are valid and effective.[17]

14. Cf. R. NAVARRO VALLS, "La inscripción del matrimonio en el registro civil...," cit., pp. 194 and 195; M. LÓPEZ ALARCÓN, *Sistema matrimonial concordado...*, cit., pp. 152 and 153.
15. Ibid.
16. F.R. AZNAR GIL, *El nuevo derecho...*, cit., p. 451.
17. Cf. J. DÍEZ DEL CORRAL RIVAS, "La nueva regulación del matrimonio en el Código civil," in *Reformas del Código civil por las Leyes de 13 de mayo y 7 de julio de 1981* (Madrid 1983), p. 24.

1122 **§ 1. Matrimonium contractum adnotetur etiam in regestis baptizatorum, in quibus baptismus coniugum inscriptus est.**

§ 2. Si coniux matrimonium contraxerit non in paroecia in qua baptizatus est, parochus loci celebrationis notitiam initi coniugii ad parochum loci collati baptismi quam primum transmittat.

§ 1. A marriage that has been contracted is to be recorded also in the baptismal registers in which the baptism of the spouses was entered.

§ 2. If a spouse contracted marriage elsewhere than in the parish of baptism, the parish priest of the place of celebration is to send a notification of the marriage as soon as possible to the parish priest of the place of baptism.

SOURCES: § 1: c. 1103 § 2
§ 2: c. 1103 § 2

CROSS REFERENCES: cc. 491, 535 § 2, 1121

COMMENTARY

Ana María Vega

Together with the matrimonial recording, the second formality that must be complied with is the marginal notes, which constitute a second means of proof of the marriage having been celebrated. Pursuant to c. 535 § 2, the book of baptisms should reflect everything that could change the canonical status of a member of the faithful, for example, adoption, receipt of sacred orders, perpetual profession made in a religious institute, change of rite, and marriage. The registration of these marginal notes is discussed in cc. 1122 and 1123, which end the chapter related to the canonical form of marriage. Canon 1103 § 2 of *CIC*/1917 contained the current c. 1122, with hardly any differences. This provision was established for more easily discovering the possible existence of an impediment of a bond or of affinity.

According to these presuppositions, all marriages are noted in the book of baptisms as a rule, and the notation of marriages celebrated with a dispensation from canonical form would have particular importance. Following these general principles, the Spanish bishops' conference provides that mixed marriages celebrated with a dispensation from canonical form shall be noted "in the margin of the baptismal certificate of the

Catholic party, and the respective communication shall be sent to the diocesan Curia."[1]

With respect to the method for proceeding to the notation, c. 1122 contemplates two situations: those in which baptism and marriage take place in the same parish (c. 1122 § 1) and those in which they take place in different parishes. In the latter case, the parish priest of the place the marriage was held must report it to the parish priest of the place where the baptism was administered, in accordance with particular law.

According to the old Instruction of the SCDS, the parish priest assisting at the marriage must send the parish of baptism at least the following: *a)* the names of the contracting parties, their parents and the witnesses; *b)* the place and date of the marriage; *c)* the name of the parish priest and seal of the parish. It may be mailed to the parish of baptism or passed on by the chancery of the local ordinary.[2] Notification is given through the diocesan vicariate when the parishes where the marriage is held and the parish of baptism for one of the parties are in different dioceses. It is unnecessary to notify the parish of the domicile or quasi-domicile of the parties when the marriage is not celebrated in either.[3]

The Instruction of the SCDS of June 29, 1941[4] provided that the parish priest of the place of baptism had to send official notice of having made the marginal notation in the book of baptisms; the parish priest of the place of celebration could not be deemed to have a clear conscience until this notice was received. The same Instruction imposed on Ordinaries the duty to visit, by themselves or through another, the archives at least annually to examine the matrimonial files, in particular, the books of marriages and baptisms. The ordinary must report yearly to the SCDS of his compliance and the result.

At present, the duty to inspect the archives and books is set forth in cc. 491 and 535 § 4. The latter provides that this inspection must be done by the bishop or his delegate during the visit (cf. c. 396), or another appropriate time.

1. NUNCIATURA APOSTÓLICA EN ESPAÑA, *Circular sobre certificación del matrimonio canónico a efectos del reconocimiento civil; Normas sobre matrimonios mixtos de la Conferencia Episcopal española,* February 8, 1971, no. 12.
2. SCDS, *Instr.*, July 4, 1921.
3. Cf. A. BERNÁRDEZ CANTÓN, *Derecho matrimonial canónico* (Barcelona 1959), p. 16.
4. *AAS* 33 (1941), p. 297.

1123 **Quoties matrimonium vel convalidatur pro foro externo, vel nullum declaratur, vel legitime praeterquam morte solvitur, parochus loci celebrationis matrimonii certior fieri debet, ut adnotatio in regestis matrimoniorum et baptizatorum rite fiat.**

Whenever a marriage is validated for the external forum, or declared invalid, or lawfully dissolved other than by death, the parish priest of the place of the celebration of the marriage must be informed, so that an entry may be duly made in the registers of marriage and of baptism.

SOURCES: —

CROSS-REFERENCES: cc. 1685, 1121, 1122

COMMENTARY

Ana María Vega

When validation for the external forum, a declaration of nullity or lawful dissolution occurs, it must be communicated to both the parish priest of the place of baptism and the parish priest of the place of the marriage, so it may be properly noted.

The entry of all these circumstances takes the form of a marginal note, which is the form used for evidencing any ensuing facts. The entry will be made through the declaration of one or both spouses, accompanied, if applicable, by the presentation of the respective document.

When the judgment of nullity of marriage is executory, the local ordinary where it was celebrated must be notified, so he can note it in the books of marriage and baptisms, along with any applicable prohibitions (see c. 1685).

CAPUT VI
De matrimoniis mixtis

CHAPTER VI
Mixed Marriages

1124 **Matrimonium inter duas personas baptizatas, quarum altera sit in Ecclesia catholica baptizata vel in eandem post baptismum recepta, quaeque nec ab ea actu formali defecerit, altera vero Ecclesiae vel communitati ecclesiali plenam communionem cum Ecclesia catholica non habenti adscripta, sine expressa auctoritatis competentis licentia prohibitum est.**

Without the express permission of the competent authority, marriage is prohibited between two baptized persons, one of whom was baptized in the catholic Church or received into it after baptism and has not defected from it by a formal act, the other of whom belongs to a Church or ecclesial community not in full communion with the catholic Church.

SOURCES: c. 1060; *MS*; *MM* 1

CROSS-REFERENCES: cc. 1086, 1108

COMMENTARY
Rafael Navarro-Valls

I. Since the new *CIC* has deleted the prohibitive impediments, it was considered appropriate to reorganize the materials on mixed marriages in a chapter (cc. 1124–1129) which regulates the former impediment of mixed religion and the form to be used in the celebration of mixed marriages.

Mixed marriages, especially after Vatican Council II, have been the object of special attention on the part of the legislator. The main provisions after the *CIC*/1917 that concern mixed marriages, are the following:

1. *Motu proprio Decretum Ne Temere*, of August 1, 1948,[1] which subjected persons who, after baptism in the Catholic Church, were brought up from childhood in heresy, schism, unbelief, or without religion, to the canonical form of marriage, thus derogating the final clause of c. 1099 § 2 of *CIC*/1917.

2. Canon 90 of the *Motu proprio Crebrae allatae*, of February 22, 1949,[2] on the form to be observed in mixed marriages under Eastern canon law.

3. Decree *Orientalium Ecclesiarum* 18 of Vatican Council II, which exempts marriages celebrated between Eastern Catholics and baptized Eastern non-Catholics from the obligatory nature *ad valorem* of the canonical form.

4. Instruction *Matrimonii sacramentum*, of March 18, 1966,[3] which maintains the observance of the canonical form for the validity of mixed marriages.

5. *Motu proprio De episcoporum muneribus* IX, 17, of June 15, 1966,[4] which reserves to the Holy See the faculty to dispense from the canonical form of marriage.

6. Decree *Crescens matrimoniorum*, of February 22, 1967,[5] which applies the provisions of *Orientalium ecclesiarum* 18 to marriages between Latin Catholics and baptized Eastern non-Catholics.

7. *Motu proprio Matrimonia mixta*, of March 31, 1970,[6] which granted local ordinaries the faculty to dispense from canonical form in mixed marriages.

8. Response of the CPIV of February 11, 1972,[7] which equates the marriage of a Catholic to a baptized Catholic who has defected from the faith and become a member of a non-Catholic denomination with a mixed marriage, regarding dispensation from the form by the ordinary.

9. Response of CPIV of April 9, 1979,[8] which confers on diocesan bishops the faculty to add invalidating clauses to restrict the scope of the dispensation from canonical form in mixed marriages.

II. The *CIC*/1917 regulated the impediment of mixed religion in c. 1060. It established the unlawfulness of a marriage celebrated without prior dispensation between two validly baptized persons, when one is Catholic and the other is a member of a heretical or schismatic sect. At the

1. *AAS* 40 (1948), p. 305.
2. *AAS* 41 (1949), p. 89.
3. *AAS* 58 (1966), p. 235.
4. *AAS* 62 (1970), pp. 257–263.
5. *AAS* 59 (1967), p. 165.
6. *AAS* 62 (1970), pp. 257–263.
7. *AAS* 64 (1972), p. 397.
8. *AAS* 71 (1979), p. 632.

same time, it was implicitly noted that this impediment of ecclesiastical law becomes an impediment of divine law in cases in which there would be danger of corruption of the Catholic spouse or the children. Until the danger ceases, the impediment cannot be dispensed.

In the votes sent by the Prelates for the preparation of Vatican Council II, there were opinions in favor of maintaining this impediment as well as opinions inclined towards more severity or its reduction.[9] Thus, several Prelates, especially from North America, ask for the impediment of mixed religion to change to an impediment to a valid marriage. On the other hand, others asked for its repeal as an ecclesiastical impediment of general law. However, the majority wanted a reduction only in some aspect such as the liturgical form, the guarantees, *etc.*

For its part, the 1967 Synod of Bishops raised several issues related to the impediment. They proposed changing the "mixed marriage" to "interconfessional marriages," "ecumenical marriage," or "interreligious marriage." They also discussed the appropriateness of the existence of an impediment within the tendency to restrict the scope of the laws to what is strictly necessary for the life of society. Nevertheless, neither the terminological change nor the total elimination of the impediment was well received.

In this way, c. 1124 reaffirms the prohibition which, as in the *CIC*/1917, is only established for the lawfulness of the marriage of a person baptized in the Catholic Church or converted thereto, provided that he or she has not defected from it by a formal act with a person who belongs to a Church or ecclesial community that does not have full communion with the Catholic Church, even if he or she is validly baptized. Under this latter denomination, we must include all those Christian communities that at various times in history have separated from the Catholic Church, provided they maintain the profession of faith in Christ and accept the Bible as the revealed word of God.

According to the CPI,[10] persons affiliated with atheistic sects should also be included. Nevertheless,[11] persons affiliated with a Communist party, or who propagate or defend their materialistic or anti-Catholic doctrines are not strictly included in the prohibition. Canon 1071 would apply to these latter persons, although it would be advisable to also demand the guarantees referred to in c. 1125. The *Response* of February 11, 1972 of the PCIDSVC (see above, I, 8), equates mixed marriages, for the purposes of dispensation from the form by the ordinary, with the marriage of a Catholic with another Catholic who has defected from the faith or has converted to another non-Catholic religion.

9. Cf. J.M. FLADER, *Los matrimonios mixtos ante la reforma del Código de Derecho Canónico* (Pamplona 1971), pp. 76ff.
10. *Respuesta*, July 30, 1934, in *AAS* 26 (1934), p. 494.
11. Cf. SCSO, *Declaración*, August 11, 1949, in *AAS* 41 (1949), p. 428.

1125 **Huiusmodi licentiam concedere potest Ordinarius loci, si iusta et rationabilis causa habeatur; eam ne concedat, nisi impletis condicionibus quae sequuntur:**

1° pars catholica declaret se paratam esse pericula a fide deficiendi removere atque sinceram promissionem praestet se omnia pro viribus facturam esse, ut universa proles in Ecclesia catholica baptizetur et educetur;

2° de his promissionibus a parte catholica faciendis altera pars tempestive certior fiat, adeo ut constet ipsam vere consciam esse promissionis et obligationis partis catholicae;

3° ambae partes edoceantur de finibus et proprietatibus essentialibus matrimonii, a neutro contrahente excludendis.

The local Ordinary can grant this permission if there is a just and reasonable cause. He is not to grant it unless the following conditions are fulfilled:

1° the Catholic party is to declare that he or she is prepared to remove dangers of defecting from the faith, and is to make a sincere promise to do all in his or her power in order that all the children be baptized and brought up in the Catholic Church;

2° the other party is to be informed in good time of these promises to be made by the Catholic party, so that it is certain that he or she is truly aware of the promise and of the obligation of the Catholic party;

3° both parties are to be instructed about the purposes and essential properties of marriage, which are not to be excluded by either contractant.

SOURCES: c. 1061 §§ 1 et 2; *MS* I et II; *MM* 1; Secr. St. Litt., 15 apr. 1970

1126 **Episcoporum conferentiae est tum modum statuere, quo hae declarationes et promissiones, quae semper requiruntur, faciendae sint, tum rationem definire, qua de ipsis et in foro externo constet et pars non catholica certior reddatur.**

It is for the *Bishops*' Conference to prescribe the manner in which these declarations and promises, which are always required, are to be made, and to determine how they are to be established in the external forum, and how the non-Catholic party is to be informed of them.

SOURCES: *MM* 7

CROSS-REFERENCES: cc. 1067, 1071, 1086

COMMENTARY

Rafael Navarro-Valls

1. Along the lines of the Instruction *MS* and no. 4 of the *Motu proprio MM*, c. 1125 attributes the faculty to grant permission for the celebration of mixed marriages to the local ordinary. The validity of this permission is solely conditioned on the existence of just and reasonable cause; if that cause exists, the permission granted is valid, even if the guarantees mentioned in this canon have not been given. In the interpretation of *MM*, doctrine questioned whether the guarantees that should be given determined the validity of the dispensation granted; nevertheless, from the text of c. 1125, it seems to be inferred that they cannot be required for the validity of the permission, because the particle *if* is only before the just and reasonable cause. In the opinion of doctrine, *just cause* is not a synonym of *light cause*, although the law leaves it to the good judgment of the local Ordinaries to estimate what is good and reasonable in the request for a dispensation.

2. Apart from this just and reasonable cause, the *CIC* requires that certain guarantees be given by the Catholic party and that the non-Catholic party be advised of them, as well as the instruction for both parties on the ends and essential properties of marriage and their duty not to exclude them.

To adequately understand these precautions, it is advisable to bear in mind that natural and divine law requires that one avoid the imminent danger of corruption of the faith of the Catholic party and of the children. Historically, the Church has used various means to ensure compliance with this condition. At the beginning, it required a promise of conversion by the non-Catholic party, then the same *abjuratio haeresis*, later the sworn statement that one would not expose the Catholic spouse to the danger of corruption, *etc.* Since the 16th century, popes have repeated that this impediment cannot be dispensed with if certain guarantees are not given, based on divine law, even if they are from ecclesiastical law.[1] Following these criteria, the *CIC*/1917 required that the non-Catholic spouse provide guarantees that he or she would not expose the Catholic spouse

1. Cf. J.M. FLADER, *Los matrimonios mixtos ante la reforma del Código de Derecho Canónico* (Pamplona 1971), pp. 133–134.

to the danger of corruption, and that both give guarantees that all the children would be baptized and educated in the Catholic religion (c. 1061).

These guarantees, in that they come from ecclesiastical law, can vary in their form and content, although there must always be some certainty that they will be complied with. In the Council debate on the *Schema*-vote on marriage, there was a tendency to have the guarantees only given by the Catholic party with the non-Catholic being informed of them. This trend was the one that was adopted, because *MS* and then *MM* released the non-Catholic party from furnishing the guarantees established in the *CIC*/1917.

3. For its part, c. 1126 transfers to each episcopal conference the determination of the method by which the declarations established in c. 1125 must be made, as well as the way to evidence them in the external forum and inform the non-Catholic party. In compliance with this provision, the General Decree of November 26, 1983 of the CBS (Art. 12.3) established that "the declarations and promises that precede mixed marriages and those referred to in c. 1126 shall comply with the provisions of the norms pronounced by this *CE* on January 25, 1971, for the application in Spain of the *Motu proprio Matrimonia mixta.*" These norms establish that the Catholic party will provide written proof in the matrimonial file of the required declaration and promise. The non-Catholic party shall also give written proof in the file of having received information on the ends and essential properties of marriage, as understood by the Catholic Church, and of being aware of the imperatives of conscience that are imposed on the Catholic spouse by his or her faith and of the promises made by this spouse in accordance with the demands of his or her Church.

1127 **§ 1. Ad formam quod attinet in matrimonio mixto adhibendam, serventur praescripta can. 1108; si tamen pars catholica matrimonium contrahit cum parte non catholica ritus orientalis, forma canonica celebrationis servanda est ad liceitatem tantum; ad validitatem autem requiritur interventus ministri sacri, servatis aliis de iure servandis.**

§ 2. Si graves difficultates formae canonicae servandae obstent, Ordinario loci partis catholicae ius est ab eadem in singulis casibus dispensandi, consulto tamen Ordinario loci in quo matrimonium celebratur, et salva ad validitatem aliqua publica forma celebrationis; Episcoporum conferentiae est normas statuere, quibus praedicta dispensatio concordi ratione concedatur.

§ 3. Vetatur, ne ante vel post canonicam celebrationem ad normam § 1, alia habeatur eiusdem matrimonii celebratio religiosa ad matrimonialem consensum praestandum vel renovandum; item ne fiat celebratio religiosa, in qua assistens catholicus et minister non catholicus insimul, suum quisque ritum peragens, partium consensum exquirant.

§ 1. The provisions of Can. 1108 are to be observed in regard to the form to be used in a mixed marriage. If, however, the Catholic party contracts marriage with an Eastern non-Catholic, the canonical form of marriage is to be observed for lawfulness only; for validity, however, the intervention of a sacred minister is required, while observing the other requirements of law.

§ 2. If there are grave difficulties in the way of observing the canonical form, the local Ordinary of the Catholic party has the right to dispense from it in individual cases, having however consulted the Ordinary of the place in which the marriage is celebrated; for validity, however, some public form of celebration is required. It is for the Bishops' Conference to establish norms whereby this dispensation may be granted in a uniform manner.

§ 3. It is forbidden to have, either before or after the canonical celebration in accordance with § 1, another religious celebration of the same marriage for the purpose of giving or renewing matrimonial consent. Likewise, there is not to be a religious celebration in which the Catholic assistant and non-Catholic minister, each performing his own rite, together ask for the consent of the parties.

SOURCES: § 1: *OE* 18; SCEC Decr. *Crescens matrimoniorum*, 22 feb. 1967 (*AAS* 59 [1967] 165–166)
§ 2: *MS* III; *MM* 9; Secr. St.. Litt. 15 apr. 1970; SCDF Resp., 13 iul. 1971; PCIDSVC Resp. I, 11 feb. 1972 (*AAS* 64 [1972] 397)
§ 3: cc. 1063 §§ 1 et 2, 1102 § 1; SCHO Resp., 26 nov. 1919; SCHO Resp., 6 iul. 1928; SCEC Resp., 26 oct. 1964; SCHO Resp., 9 feb. 1965; SCDF Resp., 16 iun. 1966; *MS* V; *MM* 13

1128 **Locorum Ordinarii aliique animarum pastores curent, ne coniugi catholico et filiis e matrimonio mixto natis auxilium spirituale desit ad eorum obligationes adimplendas atque coniuges adiuvent ad vitae coniugalis et familiaris fovendam unitatem.**

Local Ordinaries and other pastors of souls are to see to it that the catholic spouse and the children born of a mixed marriage are not without the spiritual help needed to fulfill their obligations; they are also to assist the spouses to foster the unity of conjugal and family life.

SOURCES: *MS* VI; *MM* 14; Secr. St. Litt., 15 apr. 1970

1129 **Praescripta can. 1127 et 1128 applicanda sunt quoque matrimoniis, quibus obstat impedimentum disparitatis cultus, de quo in can. 1086 § 1.**

The provisions of cann. 1127 and 1128 are to be applied also to marriages that are impeded by the impediment of disparity of worship mentioned in Can. 1086 § 1.

SOURCES: c. 1971; *MS*; *MM*

CROSS-REFERENCES: —

COMMENTARY

Rafael Navarro-Valls

1. Despite some doctrinal opinions in favor of eliminating the obligatory nature *ad valorem* of the canonical form in mixed marriages, legislation subsequent to the *CIC*/1917 has maintained this requirement (cf. *MM* 8; *MS*). For example, the 1967 Synod of Bishops responded negatively to the following proposal: "Is it advisable to eliminate the canonical form so that, when Catholics marry non-Catholics, it is required only for the liceity?"

Canon 1127 § 1 maintains this provision, expressly referring to c. 1108. Therefore, it subjects mixed marriages to the general provisions on observance of the canonical form, for validity. The only exception to this general principle has its origin in *OE* 18 and in the Decree *Crescens matrimoniorum*, of February 22, 1967.

2. With regard to the sacred minister who must be present, for validity, it should be noted that he does not necessarily have to be a Catholic minister; he may be a minister from any Christian denomination. One might wonder whether the intervention of this minister must be active, as well as whether two witnesses are necessary, since neither is expressly stated. However, both requirements should be included in the phrase *servatis aliis...*, which seems to refer not only to capacity and consent conditions, but also to these issues. This is confirmed by the provisions of c. 834 *CCEO*, which specifies that, for the marriage between an Eastern Catholic and an Eastern non-Catholic, "the blessing of a priest is required, while observing the other requirements of law."

3. Canon 1127 § 2 sets forth the faculty that *MM* 9 granted to ordinaries regarding dispensation from canonical form in mixed marriages, with some nuanced changes. This canon grants the faculty to the local ordinary of the Catholic party, after consultation with the local ordinary where the marriage will be celebrated. This is because it is the local ordinary where the marriage is to be celebrated who may more easily know whether celebration of the marriage in a non-canonical form involves some danger of scandal or other problems that should be avoided.

The grave difficulties referred to in § 2 above must be considered, as doctrine observes, with no scruple or laxity. In any event, the local ordinary must indicate at the time of the dispensation the specific public form in which the marriage must be celebrated for its validity. Some public form other than those that have been indicated by agreement by the bishops' conference for a given country may be determined, because c. 1127 does not restrict the ordinary's capacity to choose, provided that he indicates a public form, which may be required *ad valorem*.

4. The CBS, in the norms pronounced January 25, 1971 for the application in Spain of *MM*, confirmed by the General Decree of November 26, 1983, Art. 12.3, established the provisions by which the dispensation must be granted by agreement (nos. 5 and 6):

"The canonical form of the celebration of mixed marriage is an indispensable condition for its validity. Nevertheless, when there are grave causes that impede compliance with this condition, the local ordinary may also dispense with the canonical form. The following are considered grave causes: *a)* unyielding opposition from the non-Catholic party; *b)* the fact that a considerable number of relatives of the spouses refuse the canonical form; *c)* a grave conflict of conscience on the part of the contracting parties, which cannot be resolved by other means; *f)* [sic] if a foreign civil law forces at least one of the contracting parties to use a form other than the canonical form.

"Once the dispensation of the canonical form is granted, for the marriage to be celebrated in a public form, the celebration must take place: *a)* before a minister of another Christian denomination in the form prescribed thereby; *b)* before the competent civil authority in the lawfully prescribed form provided that this civil form does not exclude the essential ends of marriage."[1]

5. With respect to the reference in c. 1129, see the commentary on c. 1086.

1. Cf. *BOCEE* 3 (1984), pp. 103 (Decreto General, art. 12 §3) and 119 (Appendix with the Norms of 1971).

CAPUT VII
De matrimonio secreto celebrando

CHAPTER VII
The Secret Celebration of Marriage

1130 **Ex gravi et urgenti causa loci Ordinarius permittere potest, ut matrimonium secreto celebretur.**

For a grave and urgent reason, the local Ordinary may permit a marriage to be celebrated in secret.

SOURCES: c. 1104

CROSS-REFERENCES: cc. 1108, 1131, 1132, 1133

COMMENTARY

Juan Fornés

In the *CIC*/1917, a secret marriage was called a "marriage of conscience," which led one writer[1] to distinguish between the two possibilities, since every marriage of conscience would be a secret marriage, but not every marriage celebrated in secret would be a marriage of conscience. The characteristic that distinguished a marriage of conscience from a secret marriage was the fact that, in the case of a marriage of conscience, the obligation on the parties participating to maintain secrecy was based on, and regulated by, positive law.[2]

Obviously, this distinction may no longer be made, because what was previously called a marriage of conscience is now called a secret marriage. In the work of revising the Code, an episcopal conference suggested

1. L. MIGUÉLEZ, commentaries on cc. 1104–1107, in A. ALONSO-L. MIGUÉLEZ-S. ALONSO, *Comentarios al Código de Derecho canónico*, II (Madrid 1963), pp. 671–672.
2. Cf. ibid., pp. 671–672.

that the term "marriage of conscience" be retained because, otherwise, conflicts could arise with civil authorities. However, the consultors believed that these conflicts would exist regardless of the terminology used, if the institution were used rashly to evade civil law. Therefore, to avoid the danger of potential conflict with the civil authority, the institution would have to be deleted entirely, and the consultors indicated that there are cases in which a secret marriage provides an adequate solution *ad bonum animarum*, without any evasion of law.[3]

It should be stressed that a secret marriage does not involve the extraordinary form of marriage regulated by c. 1116. Instead, there is the public nature of the ordinary form (c. 1108), although publicity is avoided, pursuant to cc. 1130–1133.

A secret marriage is one that the local ordinary permits to be celebrated in secret, due to a grave and urgent cause. This involves carrying out the preliminary investigation in secret and having the local ordinary, the official witness, the common witnesses and the spouses maintain secrecy regarding the actual celebration of the marriage. Therefore, there are two requirements for a secret marriage: *a)* authorization from the local ordinary of the place the marriage is to be celebrated (c. 1104 *CIC*/1917 expressly excluded the vicar general without a special mandate; in the current code, he is not excluded, pursuant to c. 1130); *b)* the "grave and urgent" cause, which must be assessed by the ordinary. The *CIC*/1917 spoke of a "very grave and very urgent" cause, while the current legislation only uses the terms "grave" and "urgent." In the preparatory work, it was suggested that "urgent" be deleted, but this proposal did not receive the approval of the consultors, because the secret celebration must be considered as an exception, either because there is a "grave" cause, or because the celebration of marriage cannot be delayed ("urgent" cause).[4]

The classic example of a grave and urgent cause appears in the encyclical of Benedict XIV, *Satis vobis*, of November 17, 1741: the case of two persons who live together without having married who, nonetheless, are publicly considered husband and wife.[5] Other situations could involve unreasonable opposition from the parties' parents and some civil prohibitions, although to the extent possible, there must be accommodation between the two systems (cf., c. 1071 § 1,2°). Thus, acting to evade civil law

3. Cf. *Comm* 10 (1978), p. 101.
4. Cf. ibid., pp. 101–102.
5. Cf. *Codicis Iuris Canonici Fontes*, I (Rome 1923), p. 703. Cf. also LEO XIII, Litt. *Il divisamento*, February 8, 1893 (ibid., II (Rome 1925), pp. 393–401); L.M. DE BERNARDIS, *Il matrimonio di coscienza* (Padova 1935); idem, "'Matrimonium conscientiae' e 'Matrimonium secreto celebratum,'" in *Scritti in memoria di Pietro Gismondi*, vol. 1 (Milan 1987), pp. 541–550; idem, "Un caso di osmosi fra Diritto canonico latino e orientale: il matrimonio segreto," in *Ius Ecclesiae* 4 (1992), pp. 629–636; V. COBURN, *Marriages of Conscience* (Washington 1944).

should be avoided, as expressly stressed in the preparatory work.[6] There could be other causes, the urgency and gravity of which must be judged with discretion by the local ordinary, always bearing in mind the *bonum animarum*.[7]

In connection with the civil effects of secret marriage in Spanish law, these effects undoubtedly take place, given that the 1979 *Agreement* on juridical matters between the Holy See and the Spanish State merely speaks of "marriage celebrated according to the norms of canon Law" (Art. VI, I). The registry recording necessary for "full acknowledgment" of the civil effects is a separate issue (Art. VI, I of said *Agreement*): on this point, see commentary on c. 1133.

6. Cf. *Comm* 10 (1978), p. 101.
7. Cf. ibid.

1131 Permissio matrimonium secreto celebrandi secumfert:

1° ut secreto fiant investigationes quae ante matrimonium peragendae sunt;

2° ut secretum de matrimonio celebrato servetur ab Ordinario loci, assistente, testibus, coniugibus.

Permission to celebrate a marriage in secret involves:

1° that the investigations to be made before the marriage are carried out in secret;

2° that the secret in regard to the marriage that has been celebrated is observed by the local Ordinary, by whoever assists, by the witnesses and by the spouses.

SOURCES: c. 1105

CROSS REFERENCES: cc. 1066–1072, 1108, 1130, 1132, 1133

COMMENTARY

Juan Fornés

While the preceding canon indicates the requirements for the celebration of marriage in secret, this canon describes its fundamental characteristic features.

a) The first feature is that the preliminary investigation is conducted in secret. The preparatory measures are regulated in cc. 1066–1072. They have been considerably simplified since the *CIC*/1917, which set forth detailed provisions in cc. 1019–1034. Two Instructions from the SCDS (dated July 4, 1921[1] and June 29, 1941[2]) must also be taken into account.

In particular, c. 1067 refers to the competence of episcopal conferences in this matter. Therefore, the Spanish Bishops' Conference, through the general Decree of November 26, 1983, which went into effect July 7, 1984,[3] provides (Art. 12) that, to comply with c. 1067, a matrimonial file must be created. It is to include the examination of the couple and the witnesses (cf. no. 1). Moreover, the banns must be published by edict posted

1. *AAS* 13 (1921), pp. 348–349.
2. *AAS* 33 (1941), pp. 297–318.
3. *BOCEE* 3 (1984), p. 103.

on the church doors for fifteen days or, where it is the tradition, the banns must be read on at least two feast days (no. 2).

In connection with cc. 1066–1067, the response of the CPI of July 11, 1984 should also be considered.

This investigation must take place in secret, such that (as was stressed in the preparatory work[4]) disclosure be avoided.

b) The other characteristic of a secret marriage is the celebration in secret and the obligation to maintain secrecy on the part of the ordinary, the official witness, the common witnesses (cf. cc. 1108 et seq.) and the spouses.

The *CIC*/1917 specified that this obligation "if either of the spouses does not consent to its disclosure" (c. 1105 *CIC*/1917). This clause was slightly amended by the group working on the revision of the Code to read "unless both spouses consent to its disclosure."[5] Nevertheless, in the final text, it has been deleted entirely.[6] As a result, one author has noted[7] that there could be situations in which a secret marriage must remain a secret forever, notwithstanding the phenomenon considered in c. 1132.

The issue is resolved logically in c. 840 § 1 of the *CCEO*, which uses the same wording as c. 1105 *CIC*/1917: "either of the spouses if the other does not consent to its disclosure." It has been suggested that c. 840 § 1 *CCEO* could be considered a type of "authentic interpretation" of c. 1131 *CIC*, since both norms have a common objective. Therefore, the obligation to maintain secrecy, in addition to the situation in c. 1132, also ceases in this other case.[8]

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4. Cf. *Comm* 10 (1978), p. 102.
5. Cf. ibid., p. 102. Cf. also L.M. DE BERNARDIS, "'Matrimonium conscientiae' e 'Matrimonium secreto celebratum,'" in *Scritti in memoria di Pietro Gismondi*, vol. 1 (Milan 1987), pp. 548–549.
6. Cf. also *Comm* 10 (1978), p. 127.
7. Cf. L.M. DE BERNARDIS, "Un caso di osmosi fra Diritto canonico latino e orientale: il matrimonio segreto," in *Ius Ecclesiae* 4 (1992), p. 633.
8. Cf. ibid., pp. 634–636.

1132 **Obligatio secretum servandi, de qua in can. 1131, n. 2, ex parte Ordinarii loci cessat si grave scandalum aut gravis erga matrimonii sanctitatem iniuria ex secreti observantia immineat, idque notum fiat partibus ante matrimonii celebrationem.**

The obligation of observing the secret mentioned in Can. 1131 n.2 ceases for the local Ordinary if from its observance a threat of grave scandal or grave harm to the sanctity of marriage arises. This fact is to be made known to the parties before the celebration of the marriage.

SOURCES: c. 1106

CROSS-REFERENCES: cc. 1130, 1131, 1133

COMMENTARY

Juan Fornés

The obligation to observe secrecy referred to in the preceding canon ceases for the local ordinary when the circumstances indicated in this canon arise, namely the threat of grave scandal or grave harm to the sanctity of marriage.

There are two changes in this area from the provisions of the *CIC*/1917:

a) The clause was included providing that the ordinary must advise the parties before the celebration of the marriage of the circumstances that relieve him of the obligation to maintain secrecy. This clause was suggested in the preparatory work for the drafting of the initial *schema.*[1]

b) The circumstances relieving the ordinary of the obligation to maintain secrecy have been more generically formulated. Canon 1106 of the *CIC*/1917 listed not only the threat of grave scandal and the threat of grave harm against the sanctity of marriage, but also the couple's failure to ensure their children's baptism and Christian education, and the baptism of children under false names, without informing the ordinary within thirty days of the fact and the true parents. This list was not considered exhaustive.

1. Cf. *Comm* 10 (1978), p. 102.

During the preparatory work, it was suggested that one of these cases be retained, namely the parents' failure to ensure their children's baptism and Christian education.[2] However, the text contained in the canon was chosen. Therefore, the current formulation gives the ordinary greater freedom to assess the circumstances that relieve him of the obligation to maintain secrecy.

2. Cf. ibid., pp. 102–103.

1133 Matrimonium secreto celebratum in peculiari tantummodo regesto, servando in secreto curiae archivo, adnotetur.

A marriage celebrated in secret is to be recorded only in a special register that is to be kept in the secret archive of the curia.

SOURCES: c. 1107

CROSS REFERENCES: cc. 489, 490, 1121, 1122, 1130, 1131, 1132

COMMENTARY

Juan Fornés

To the characteristics described in c. 1131 (preliminary investigation in secret and the obligation to maintain secrecy), this canon adds a third feature of marriages celebrated in secret: recording in a special register, kept in the secret archive of the curia (cf. cc. 489 and 490). This is different from the duties referred to in cc. 1121 and 1122: recording in the register of marriages and the notation that must be made in the register of baptisms.

Like every canonical marriage, marriage in secret has civil effects in Spanish law (see commentary on c. 1130). However, the "full acknowledgment" of these effects requires the recording in the civil registry (Art. VI, 1, and final Protocol of the 1979 *Agreement* on juridical matters).

In this sense, doctrine has concerned itself with the various types of recording and their importance in publicity.[1]

For one thing, recording in the special register of the curia "is not juridically irrelevant, rather it implies the existence of an authentic canonical marriage which has civil effects that are simply acknowledged by the State, even if their feasibility is influenced in some cases by their confidentiality."[2] But, the marriage also can be recorded in the "special book of the central civil Registry"(Art. 64, Spanish Civil Code) provided that both spouses request this (Art. 78, Law of Spanish Civil Registry). Article 267,1 of the Regulations of the Spanish Civil Registry (in its amendment of August 29, 1986) provides that "the marriage in secret, regardless of the legal form in which it is celebrated, shall be recorded in the Special Book."

1. Cf. R. DURÁN, *La inscripción en el Registro civil del matrimonio canónico* (Madrid 1988), pp. 186–199, with ample bibliographical references on the subject.
2. Ibid., p. 190.

However, "this norm in itself is insufficient to establish without any other supplement the obligation in question, because as long as the legitimated persons are not indicated, it loses its external force, especially when the Center in charge of the special Registry cannot act ex officio in the matter ..." such that for a secret marriage "this recording is not obligatory, without prejudice to its carrying out when the spouses so agree (Art. 80,1 LRC)."[3]

Recording in the special book of the Central Registry involves a means of proof of the act performed, when the interested parties so desire, even if it does not provide *in actu* a publicity *erga omnes*, a publicizing effect as regards third parties. This undoubtedly occurs because of its hypothetical recording in the ordinary civil registry that, according to Art. 79 of the Law of Civil Registries, could be requested by both spouses by mutual agreement, by the surviving spouse, or by the ordinary, in cases in which his canonical obligation of secrecy ceases: "The relevance of the publication of the canonical secret marriage, it has been said in this regard,[4] is not much different from the publication of a marriage entered into under ordinary circumstances: it give full acknowledgment of the civil effects of the celebration (Art. 61 *CC*) and, also, according to Art. 64 *CC*, it determines 'the acknowledgment of the secret marriage,' even if its scope, 'would prejudice the rights acquired in good faith by third partis' (Art. 61 and Art. 64 *CC*) among other issues ... is identical in both phenomena."

3. Ibid., pp. 191–192.
4. Ibid., p. 199.

CAPUT VIII
De matrimonii effectibus

CHAPTER VIII
The Effects of Marriage

1134 **Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; in matrimonio praeterea christiano coniuges ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur.**

From a valid marriage there arises between the spouses a bond which of its nature is permanent and exclusive. Moreover, in Christian marriage, the spouses are by a special sacrament strengthened and, as it were, consecrated for the duties and the dignity of their state.

SOURCES: c. 1110; *LG* 41; *GS* 48; *HV* 25

CROSS REFERENCES: cc. 1055, 1056, 1057, 1061, 1085, 1096, 1101, 1135, 1136, 1137–1140

COMMENTARY

Juan Fornés

1. *Juridical relationship between marriage and its elements*

From a thorough examination of the first paragraph of this canon, one may observe that a "valid marriage" is marriage *in fieri,* that is, the conjugal covenant or agreement of wills between a man and woman.[1] This conjugal covenant, originating with consent (c. 1057), gives place to the marriage *in facto esse,* the formal principle of which distinguishes

1. Cf. *Comm* 10 (1978), p. 104. On the subject matter of this canon, cf. CCE, 1638–1654.

marriage from other relationships that appear similar, is "a bond which of its own nature is permanent and exclusive."

As stressed by *Gaudium et Spes* 48, "from the human act by which the partners mutually surrender themselves to each other; for the good of the partners, the children, and society, this sacred bond no longer depends on human decision alone. For God himself is the author of marriage and has endowed it with various benefits and with various ends in view ..."

In juridical terms, marriage, considered as itself (the conjugal partnership or community, the marriage *in facto esse*) is a juridical relationship of commonality, the elements of which are the subjects, the bond, the object and the content.[2] Avoiding doctrinal and theoretical digressions,[3] the following is a canonical analysis of these elements:

1) *The subjects.* Obviously, only a man and a woman may be the subjects of this juridical relationship (cf. c. 1096 § 1), taking into account that unity is an essential property of marriage (c. 1056).

2) *The bond.* This is the primary, fundamental and basic nexus that unites the spouses. It radically contains all the conjugal rights and obligations. Because of the bond, man and wife communicate with each other in the masculine and feminine structures of the person such that, in this same measure, they take part in the person of the other spouse, at the same time that they share in the objectives of marriage (cf. c. 1055).

This bond has some characteristics that are clearly deduced from a thorough reading of c. 1134:

a) It is *unique.* There are not two bonds, the man's with respect to the woman and another of the woman with respect to the man, but just one, that is, the union between a man and a woman, originating in the

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2. Cf. J. HERVADA, "El matrimonio 'in facto esse.' Su estructura jurídica," in *Ius Canonicum* 1 (1961), pp. 135ff; also in *Vetera et Nova*, I (Pamplona 1991), pp. 1–53; J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III/1, *Derecho matrimonial* (Pamplona 1973), pp. 177–260; J. FORNÉS, *Derecho matrimonial canónico* (Madrid 1990), pp. 171ff.

3. Cf. previous note; also, among others, G. EISENRING, "La comunidad conyugal en el ordenamiento canónico," in *Excerpta e dissertationibus in Iure Canonico* VII (Pamplona 1989), pp. 133ff; R. LLANO CIFUENTES, "A naturaleza jurídica do matrimônio à luz do novo Código de Direito Canónico," in *Ius Canonicum* 54 (1987), pp. 557ff; E. MOLANO, *Contribución al estudio sobre la esencia del matrimonio* (Pamplona 1977); U. NAVARRETE, *De structura iuridica matrimonii secundum Concilium Vaticanum II*, (Rome 1968); F.R. AZNAR, *El nuevo Derecho matrimonial canónico*, 2nd ed. (Salamanca 1985); A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), pp. 245ff; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), pp. 261ff; J.Mª GONZÁLEZ DEL VALLE, *Derecho canónico matrimonial según el Código de 1983*, 4th ed. (Pamplona 1988); Z. GROCHOLEWSKI-M. POMPEDDA-C. ZAGGIA, *Il matrimonio nel nuovo Codice di Diritto Canonico* (Padova 1984); H. HEIMERL-H. PREE, *Kirchenrecht. Allgemeine Normen und Eherecht* (Vienna 1983); I. GRAMUNT-J. HERVADA-A.W. LEROY, *Canons and Commentaries on Marriage* (Collegeville (MN) 1987); G. LO CASTRO, *Tre studi sul matrimonio* (Milan 1992).

conjugal covenant: "Thus the man and woman, who 'are no longer two but one' (Mt 19:6), help and serve each other by their marriage partnership. They become conscious of their unity and experience it more deeply from day to day. The intimate union of marriage, as a mutual giving of two persons, and the good of the children demand total fidelity from the spouses and require an unbreakable unity between them" (*GS* 48).

This is what doctrine calls *individuitas matrimonii*, the individuality or uniqueness of marriage. Therefore, if marriage is null, it is null for both parties. It could not be null for one and not for the other; the marriage is null, regardless of the effects of the putative marriage (c. 1061 § 3; cf. also cc. 1137 and 1139).

b) It is *permanent*. It unites the spouses in all their capacity to be united and, as a result, *for all their life*. Therefore, the bond is indissoluble "of its nature" (see commentary on c. 1056). It was suggested during the preparatory work on the revision of the *CIC* that the words *natura sua* be deleted in connection with indissolubility. However, the consultors did not find this advisable.[4] Consequently, trial marriages are not possible (cf. c. 1101 § 2).

c) It is *exclusive*. Thus, one of its essential properties is *unity* (c. 1056). The spouses are united in all their natural inclinations and cannot be united to another person. Thus, an attempt to enter into another marriage, while the prior one remains, would collide with the impediment of the bond (c. 1085) and would be null.

d) It is *mutual*. The bond joins the spouses to each other, so there cannot be a marriage in which one is bound and the other is not.

3) *The object*. It consists of the personal giving by both spouses of their respective rights and duties.

4) *Content*. It is all the conjugal rights and duties:[5]

a) The *right to the conjugal act*. It is a right-duty to the conjugal act spoken of in c. 1061 § 1: "a conjugal act in itself apt for the generation of offspring: to this act marriage is by its nature ordered ..." Note also that c. 1055 § 1 states that marriage "of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children." This means that the matrimonial practices designed for generation inform the entire structure of marriage, such that the uniting and procreating significance cannot be separated in the conjugal acts.[6]

4. Cf. *Comm* 10 (1978), pp. 104–105.

5. Cf. in this sense, J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*..., cit., pp. 223–254, from which the classifications here listed have been adapted; J. FORNÉS, *Derecho matrimonial canónico*, cit., pp. 173ff.

6. Cf. *HV* 12; JOHN PAUL II, *Discurso*, July 11, 1984, nos. 2–6, in *Insegnamenti di Giovanni Paolo II* VII/2 (1984), pp. 85–88; idem, *Discurso*, October 10, 1984, no. 3, in *Insegnamenti*... cit., p. 846; CDF, Instr. *Donum vitae* of February 22, 1987, II, B.

b) The *right-duty not to impede the procreation of children.* This is a consequence of the foregoing and refers to the omission of activities that may impede the generative process (for example, sterilization, abortive practices, use of contraceptives, etc.).

c) The *duty to receive the children* in the conjugal community. This means not to threaten the life or bodily safety of children already born and to receive them into the conjugal community, in that this constitutes the fullest basic structure that is the family.

d) The *right to the commonality of conjugal life.* Although c. 1055 § 1 describes marriage as a "a partnership of their whole life," this right to commonality of conjugal life is not mere physical cohabitation but something deeper that involves a share in the personal nature of the other spouse in conjugal aspects and a solidarity of destiny and objectives, which become common. That is why c. 1135 states: "Each spouse has an equal obligation and right to whatever pertains to the partnership of conjugal life."

e) The *right-duty to educate the children.* Apart from the fundamental fact of c. 1055 § 1, regarding the design of marriage for "procreation and upbringing of children," this right-duty is expressly set forth in c. 1136 (see commentary, which refers to other places in which the Code establishes specific norms related to the various aspects of education: physical, social, cultural, moral, religious).

2. *Juridical relationships derived from marriage*

Together with the main juridical relationship, from marriage come *derived juridical relationships*: 1) the economic relationship between the spouses, which may be regulated by law or by agreement between them; 2) the right of the children to be received in the family community that their parents have formed; and 3) the right of the children to be educated by their parents in this family community.[7]

3. *The sacrament of marriage*

The second part of c. 1134 refers to the sacramental nature of Christian marriage, utilizing as its basis *Gaudium et Spes* 48[8] (see commentary on c. 1055). It is sufficient to stress that this union between man and woman has been entirely elevated, through the new institution brought about by Christ, to the dignity of a sacrament, such that the spouses receive the grace to live the demands involved in their vocation and status.

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7. Cf. J. HERVADA, "El matrimonio canónico. Teoría general," in *Derecho canónico* (Pamplona 1975), p. 390.

8. Cf. *Comm* 10 (1978), p. 105. Cf. also, regarding this topic, CPITL, *Congregatio plenaria, diebus 20–29 octobris 1981 habita* (Typis polyglottis Vaticanis 1991), pp. 480–485.

1135 **Utrique coniugi aequum officium et ius est ad ea quae pertinent ad consortium vitae coniugalis.**

Each spouse has an equal obligation and right to whatever pertains to the partnership of conjugal life.

SOURCES: c. 1111; SRR Decisio *coram* Anné, 8 nov. 1963; *HV* 9, 10; SRR Decisio *coram* Serrano, 3 apr. 1973

CROSS REFERENCES: cc. 104, 208, 1055, 1134, 1136, 1151

COMMENTARY

Juan Fornés

If marriage considered in itself is a juridical relationship of communality (see c. 1134 and commentary), both parties in the juridical relationship are on a level of radical equality with respect to the rights and obligations implied in the juridical relationship. Thus, according to c. 1135, each "has an equal obligation and right to whatever pertains to the partnership of conjugal life." Moreover, as a juridical relationship of commonality, marriage involves mutual participation in the natures of the two persons in the way they complement each other and solidarity of common destiny.[1]

In this sense, one should distinguish between "conjugal commonality" (the *communitas vitae et amoris coniugalis*, spoken of in *Gaudium et Spes* 48 and the *totius vitae consortium*, spoken of in c. 1055 § 1) and "conjugal cohabitation" (the *convictus coniugalis* referred to in c. 1151).[2] The "conjugal commonality" or "partnership for life" is marriage itself, while "conjugal cohabitation" is a normal and natural consequence of marriage, which cannot be thwarted without a proportionate and lawful cause, since it arises from a demand of justice, which entails a duty for the spouses and a right with regard to third parties.[3]

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1. Cf. CCE, 371–372; J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III/1, *Derecho matrimonial* (Pamplona 1973), pp. 197–260, especially p. 217.

2. Cf. *Comm* 9 (1977), pp. 122–123; and 10 (1978), p. 118; *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis polyglottis Vaticanis 1981), pp. 242–245.

3. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho...*, cit., p. 244. *See also* J. FORNÉS, *Derecho matrimonial canónico* (Madrid 1990), pp. 171ff and 187ff; idem, "El principio de igualdad en el ordenamiento canónico," in *Fidelium Iura* 2 (1992), pp. 113ff; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), pp. 261ff; R. NAVARRO VALLS, *Estudios de Derecho matrimonial* (Madrid 1977), pp. 135ff; A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), pp. 248ff.

It may be asked what it is that "pertains to the partnership of conjugal life" and to what "each spouse has an equal obligation and right," as set forth in c. 1135. This question was posed indirectly during the revision of the Code. As reported in *Communicationes*, there were some objections to the literal meaning of the canon, to have the obligations and rights of the spouses determined more precisely, such as the multiplication of the Christian people, the help and service that must be given to each other, *etc.* Nevertheless, the consultors felt that the purpose of the canon was to stress the principle of equality between the spouses with respect to rights and duties. It was believed that this objective was optimally achieved in the wording of the canon as it was.[4]

If one tries to state this generic formulation more precisely, what "pertains to the partnership of conjugal life" is the *content* of the matrimonial juridical relationship, such as: *a)* the right to the conjugal act; *b)* the right-duty to not impede the procreation of children; *c)* the duty to receive children into the conjugal community; *d)* the right to commonality of conjugal life; and *e)* the right-duty to educate children of the union.

The intent of c. 1135 is to stress the principle of radical equality between husband and wife in *everything* that belongs to the conjugal partnership, not only *ad actus prorios coniugalis vitae*, as stated in c. 1111 *CIC*/1917. Hence, as indicated by John Paul II, "Above all it is important to underline the equal dignity and responsibility of women with men. This equality is realized in a unique manner in that reciprocal self-giving by each one to the other and by both to the children which is proper to marriage and the family" (*FC* 22).[5] With respect to the man, he stresses: "Within the conjugal and family communion-community, the man is called upon to live his gift and role as husband and father. In his wife, he sees the fulfillment of God's intention: 'It is not good that the man should be alone, I will make him a helper fit for him,' and he makes his own the cry of Adam, the first husband: 'This at last is bone of my bones and flesh of my flesh' (Gen. 2, 18). Authentic conjugal love presupposes and requires that a man have a profound respect for the equal dignity of his wife ..." (*FC* 25, cf. CCE, 371–372).

This radical equality is properly combined with a functional diversity in the family. "In the family, as has been written in this regard, there is an 'order' of functions that must always be respected. This diversity of functions basically comes from the difference between men and women from the point of view of the way they exercise their sexuality. In fact, men and women are equal in dignity as human beings, but they have distinct and complementary functions, in the family and in society, because of their different sexuality. In the family and in marriage, therefore, that same

4. Cf. *Comm* 10 (1978), p. 105. Cf. also CPITL, *Congregatio plenaria, diebus 20–29 octobris 1981 habita* (Typis polyglottis Vaticanis 1991), pp. 480–485.
5. CF. also JOHN PAUL II, Litt. Ap. *Mulieris dignitatem*, August 15, 1988; CCE, 369–372.

radical equality and functional difference is reproduced, which is affirmed by members of the Church, all equal as God's children and called to holiness, but each through a specific and distinct pathway."[6]

In the sphere of positive law, this radical equality is manifested, for example, in the deletion of c. 1112 *CIC*/1917, according to which women shared in the canonical "status" of their husbands, unless otherwise provided by special law. In this regard, also of interest is the change regarding domicile and quasi-domicile. According to the *CIC*/1917, married women had the legal domicile or quasi-domicile of their husbands (cf. c. 93 *CIC*/1917), but the *CIC* refers to the "common" domicile or quasi-domicile of the spouses. In the event of a lawful separation or for another just cause, each spouse may have his or her own domicile or quasi-domicile (c. 104). In this sense, it has been noted that the effect by which the spouses have a common domicile or quasi-domicile "as provided in c. 93 of the Code of 1917, does not come from a married woman's acquisition of her husband's domicile, but from the very nature of things."[7]

6. Cf. C. BASEVI, "Personalità umana e sottomissione della donna nei testi paolini," in *Fidelium Iura* 3 (1993), p. 147. Also J. HERVADA-P. LOMBARDÍA, *El Derecho*..., cit., pp. 252–254.

7. M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso*..., cit., pp. 265–266.

1136 Parentes officium gravissimum et ius primarium habent prolis educationem tum physicam, socialem et culturalem, tum moralem et religiosam pro viribus curandi.

Parents have the most serious obligation and the primary right to do all in their power to ensure their children's physical, social, cultural, moral and religious upbringing.

SOURCES: cc. 1113, 1372 § 2; PIUS PP. XI, Enc. *Divini Illius Magistri,* 31 dec. 1929, 59–60 (*AAS* 22 [1930] 49–86); PIUS PP. XI, Enc. *Mit brennender Sorge,* 14 mar. 1937, 164–165 (*AAS* 29 [1937] 145–167); PIUS PP. XII, All., 8 sept. 1946; *LG* 11; *GE* 3, 6; *GS* 48; CIP Del. *Il dinamismo della fede,* 10 dec. 1974, n. 38, 5°

CROSS REFERENCES: cc. 226 § 2, 793, 795, 796, 797, 799, 835 § 4, 868, 920, 1055 § 1, 1086,1125, 1126, 1134, 1135, 1153 § 1, 1154, 1366, 1689

COMMENTARY

Juan Fornés

Within the *content* of the juridical matrimonial relationship, there is the *right-duty to educate the children* (see commentary on c. 1134). At the same time, it should be noted that c. 1055, when setting forth the descriptive concept of marriage, says that "of its own very nature [it] is ordered to the well-being of the spouses and to the procreation and upbringing of children."

Now then, this legal provision, which reflects and improves the former c. 1113 *CIC*/1917, sets forth the "primary right" and "the most serious obligation" of the parents to see to the various aspects of their children's upbringing.

For its part, c. 226 § 2, within the context of "the obligations and rights of the lay members of Christ's faithful" (tit. II, part I of book II), indicates that "Because they gave life to their children, parents have the most serious obligation and the right to educate them. It is therefore primarily the responsibility of Christian parents to ensure the Christian education of their children in accordance with the teaching of the Church." And c. 793, in the context of the "teaching office of the Church" (book III) and, to be specific, at the beginning of the provisions on "Catholic Education" (tit. III), also stresses that parents and those who take their place have the duty and the right to educate their children; and it emphasizes that Catholic parents have the obligation and the right to choose those means and

institutes through which they can best provide the Catholic education of their children. They also have the right, said canon indicates finally, to avail themselves of that assistance from civil society which they need to provide a Catholic education for their children.

As is well known, Vatican Council II has particularly insisted on this primary right and on this obligation that devolves upon parents with respect to the education of their children. We shall simply set forth here three important texts:

a) *Gaudium et Spes* 48: "As for the spouses, when they are given the dignity and role of fatherhood and motherhood, they will eagerly carry out their duties of education, especially religious education, which primarily devolves on them" (cf. also *GS* 50 and 52).

b) *Gravissimum Educationis* 3: "As it is the parents who have given life to their children, on them lies the gravest obligation of educating their family. They must therefore be recognized as being primarily and principally responsible for their education. The role of parents in education is of such importance that it is almost impossible to provide an adequate substitute. It is therefore the duty of parents to create a family atmosphere inspired by love and devotion to God and their fellow-men which will promote an integrated, personal and social education of their children" (cf. also nos. 6–7).

c) *Dignitatis humanae* 5: Parents "have the right to decide in accordance with their own religious beliefs the form of religious upbringing which is to be given to their children. The civil authority must therefore recognize the right of parents to choose with genuine freedom schools or other means of education. Parents should not be subjected directly or indirectly to unjust burdens because of this freedom of choice."

John Paul II, for his part, commenting on said text from *Gravissimum Educationis* 3, has stressed that "The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others" (*FC* 36; cf. also 37–41; and *CCC* 902, 1652 et seq., 2221, 2223, 2229, 2685; and *Letter to Families* 16).

If from these expressive texts of the Magisterium we pass to the code provisions,[1] besides the fundamental information already mentioned from c. 1055 § 1, there are also concrete norms related to the various aspects of the education referred to in the canon under discussion here. Thus, for

1. Cf. *Comm* 10 (1978), p. 105. Cf. also, relative to this issue, CPITL, *Congregatio plenaria, diebus 20–29 octobris 1981 habita* (Typis polyglottis Vaticanis 1991), pp. 480–485. One can consult, among others, M.E. CASELLATI ALBERTI, *L'educazione dei figli nell'ordinamento canonico* (Padova 1992).

example, “Parents are obliged to see that their infants are baptised within the first few weeks. As soon as possible after the birth, indeed even before it, they are to approach the parish priest to ask for the sacrament for their child, and to be themselves duly prepared for it” (c. 867 § 1); they must concern themselves with what is involved in the first communion (c. 914); more than anyone else, they are obligated to raise their children in the faith and in the practice of Christian life, through words and examples (c. 774 § 2); they must entrust their children to those schools where Catholic education is imparted; and should this not be possible, they have the obligation to see that proper Catholic education is organized outside of the schools (c. 798); they must see that they receive the sacrament of confirmation (c. 890); and, lastly, other aspects contemplated in said cc. 226 § 2 and 793, and in cc. 795–797, 799, 835 § 4, 868, 920, 1366, 1689.

Lastly, it should be stressed that the canonical code pays particular attention to the phenomena in which the upbringing of children may be affected by special circumstances: for instance, when one of the spouses is not Catholic (because he or she was not baptized or belongs to a Christian faith that is not in full communion with the Catholic Church), or when he or she places the children in grave spiritual or physical danger. In the first case, the provisions of c. 1086 and the guarantees established in cc. 1125 and 1126 should be considered. For the second case, c. 1153 § 1 indicates that conjugal separation may be appropriate, and if it takes place, “When a separation of spouses has taken place, appropriate provision is always to be made for the due maintenance and upbringing of the children,” as indicated in c. 1154.

1137 Legitimi sunt filii concepti aut nati ex matrimonio valido vel putativo.

Children conceived or born of a valid or putative marriage are legitimate.

SOURCES: c. 1114

CROSS REFERENCES: cc. 101, 111, 877, 1061, 1138, 1139, 1140

COMMENTARY

Juan Fornés

This canon discusses the *notion* of the legitimacy of children, while c. 1138 discusses the issue of its *proof* when it is unknown or is challenged.

During the revision of the *CIC*/1917, deletion of the canons on legitimacy was suggested, because of the tendency in civil law to consider legitimate and illegitimate children as equal and because the new *CIC* no longer sets forth the irregularity due to a birth defect. Therefore, it was argued that "there is no reason to retain in the Code the notions of legitimate or illegitimate children that are of no consequence in law."[1] However, these suggestions were not accepted by the respective study group, which stressed that this notion is still necessary because of the consequences it could have in particular law.[2]

After the effects of illegitimacy disappeared in the 1980 *Schema*, it was again suggested that the referring to illegitimacy be deleted, because if the notion remains, the stigma of illegitimacy does as well. It was suggested that, wherever necessary, particular law could make appropriate provisions.[3] In response, the Secretariat and the Consultors of the Commission stated: "Although all the effects of illegitimacy have been removed from universal law, these canons remain most advisably because they may be applied in particular law and, on the other hand, in their way they highlight the sanctity of marriage."[4]

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1. Cf. *Comm* 10 (1978), p. 106.
2. Cf. ibid., p. 106.
3. Cf. *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis polyglottis Vaticanis 1981), p. 264.
4. Cf. ibid., p. 264.

Canon 1137 outlines the notion of legitimacy based on two coordinates. The first refers to the fact that it may come from a valid and from a putative marriage, the latter being an invalid marriage celebrated in good faith by at least one party, until both acquire certainty of the nullity (c. 1061 § 3). The second refers to the relationship between conception and birth that gives the child the status of legitimate or illegitimate, since the canon refers to children "conceived or born" of a valid or putative marriage. Thus, legitimate children are: 1) those conceived before the marriage, but born during the marriage; 2) those conceived and born during the marriage; and 3) those conceived during the marriage, but born after the dissolution of the marriage or the termination of conjugal life.[5]

In all other cases, the children will be illegitimate. Doctrine has usually distinguished between children born outside of marriage to persons who were not impeded from marriage (*natural* children) and children born to persons impeded from marriage (*bastard* children). The latter are classified as *adulterine* (when there is an impediment due to a prior bond), *sacrilegious* (when there is an impediment due to a vow or sacred orders), and *incestuous* (when there is an impediment of consanguinity or affinity).[6]

According to the *CIC*/1917, illegitimate children could not be cardinals (c. 232 § 2,1°), bishops (c. 331 § 1,1°), nor abbots or prelates *nullius* (c. 320 § 2), even if they had been legitimated. They also could not be major superiors in religious orders (c. 504) nor could they be admitted in the seminary (c. 1363 § 1), or ordained (c. 984), unless they had been legitimated. All of these limitations have disappeared in the current Code. As a result, the distinction between legitimate and illegitimate children is still of major interest from the point of view of the protection of the identity of the marriage itself, but without negative consequences for the children.

5. Cf. R. NAVARRO VALLS, commentary on cc. 1137–1138, in *Pamplona Com.* In general, regarding filiation, cf. M. LÓPEZ ALARCÓN, "La filiación en el Derecho canónico. Su correspondencia en el Derecho civil," in *Pretor* 97 (1977), pp. 325ff; L. PORTERO, "El Derecho canónico latino ante el tema de la filiación extramatrimonial," in *Mélanges à la mémoire de M.A. Dendias* (Atenas–Paris 1978), pp. 401ff.

6. Cf. M. LÓPEZ ALARCÓN, "La filiación…," cit., p. 338; A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), pp. 251–252; J. FORNÉS, *Derecho matrimonial canónico* (Madrid 1990), p. 175.

1138 **§ 1. Pater is est, quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur.**

§ 2. Legitimi praesumuntur filii, qui nati sunt saltem post dies 180 a die celebrati matrimonii, vel infra dies 300 a die dissolutae vitae coniugalis.

§ 1. The father is he who is identified by a lawful marriage, unless the contrary is proven by clear arguments.

§ 2. Children born at least 180 days after the date the marriage was celebrated, or within 300 days from the date of the dissolution of conjugal life, are presumed legitimate.

SOURCES: § 1: c. 1115 § 1
§ 2: c. 1115 § 2

CROSS REFERENCES: cc. 877, 1061, 1137, 1139, 1140, 1526–1586

COMMENTARY

Juan Fornés

If c. 1137 concerns the *notion* of legitimacy, c. 1138 regulates its *proof* when it is challenged or unknown.[1] In this sense, the canon establishes two presumptions *iurus tantum.*

The first refers to paternity (§ 1) and sets forth a Roman text of Paul, set forth in the Digest: "*pater*'... *is est, quem nuptiae demonstrant*" (cf. D. 2,4,5). This means that, "unless by clear arguments the contrary is proven," the husband of the woman when the child is conceived is the father. Doctrine usually illustrates the "clear arguments" through assumptions that basically come down to the absence or physical distance of the husband during the reasonable time for conception, supervening impotence, or a similar circumstance.

The second assumption (§ 2) connects conception and birth, establishing some terms that are computed by days, in contrast to c. 1115 § 2 of the *CIC*/1917, which calculated by months ("it is presumed that children

1. Cf. M. LÓPEZ ALARCÓN, "La filiación en el Derecho canónico. Su correspondencia en el Derecho civil," in *Pretor* 97 (1977), pp. 20–21; P. CIPROTTI, "De prole legitima vel illegitima in iure canonico vigenti," in *Apollinaris* (1939), p. 334; R. NAVARRO VALLS, commentary on cc. 1137–1138 in *Pamplona Com.*

born at least six months after the day the marriage is celebrated or within ten months after the dissolution of conjugal life are legitimate").

The means of proof are those regulated by cc. 1526 to 1586. There are no limitations for the investigation of paternity, such that biological evidence is allowed, among other types. Doctrine has usually highlighted the scope with which canon law has always handled the question of paternity, to the extent that canon law has been proposed as a model for the regulation of civil systems. For example, Fuenmayor writes: "There (in the former canon law) is a more liberal system" in this area.[2]

With respect to proof of maternity on the part of the wife, the ancient Roman text of Paul (cf. D. 2,4,5) should be noted: "*quia* [*mater*] *semper certa est*," by which it will be sufficient to demonstrate the fact of the birth and the identity of the child.

With regard to the "dissolution of conjugal life" referenced in § 2 of the canon as the beginning of the second presumptive term provided, this does not refer only to dissolution of marriage, in the strict sense, but also to a declaration of nullity (if the basis of the legitimate filiation were a putative marriage), and to separation with the bond remaining.[3]

In the case of artificial insemination, it is clear that, apart from its negative moral assessment, be it homologous or heterologous,[4] with respect to the legitimacy of the children, it must be concluded that in the first phenomenon (homologous) they will be legitimate and not in the second (heterologous).

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2. A. DE FUENMAYOR, "Contestación al discurso de M. de la Cámara: 'Reflexiones sobre la filiación ilegítima en el Derecho español,'" in *Estudios de Derecho civil*, II (Pamplona 1992), p. 826.

3. Cf. A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), pp. 252–253.

4. Cf. SCDF, Instr. *Donum vitae*, February 22, 1987, II.

1139 **Filii illegitimi legitimantur per subsequens matrimonium parentum sive validum sive putativum, vel per rescriptum Sanctae Sedis.**

Illegitimate children are legitimated by the subsequent marriage of their parents, whether valid or putative, or by a rescript of the Holy See.

SOURCES: c. 1116; CodCom Resp. II, Dec. 6, 1930 (*AAS* 23 [1931] 25)

CROSS-REFERENCES: cc. 59–75, 1061, 1137, 1138, 1140

COMMENTARY

Juan Fornés

The *favor polis*, present in the canonical system, clearly appears in this canon, which broadly regulates the *legitimization* of children. This can be done through the subsequent valid or putative marriage of the parents (even if they were unable to contract marriage when the child was conceived, during gestation, or when the child was born[1]) or through a rescript of the Holy See. The latter was not expressly mentioned in the *CIC*/1917, although it has clear antecedents in historical law (for example, the decretals of Innocence III *Apostolica Sedes*[2] and *Per venerabilem*[3]), and it was understood to be included in the powers of the Roman Pontiff set forth in c. 218 of the *CIC*/1917.[4] This rescript would go into effect in cases in which marriage between the parents of the illegitimate child is impossible. However, it is possible that a rescript of legitimization could be granted in a situation in which the parents could marry, but do not wish to do so.

It is true that the *favor prolis* is very present in this canon, such that (as has been stressed in doctrine[5]), the canonical approach to legitimacy of children is very broad, inasmuch as there is the claim that it reaches the greatest number of persons possible: not only natural children, but also those called spurious (see commentary on c. 1137).

1. Cf. also CPI, *Respuesta* II, December 6, 1930: *AAS* 23 (1931), p. 25.
2. *PL* 214, cols. 1193–1194.
3. *X* 4,17,13.
4. Cf. R. NAZ, "Légitimation," in *Dictionnaire de Droit canonique* VI (Paris 1957), cols. 377–389; HERRMANN, *Die Stellung unehelicher Kinder nach kanonischem Recht* (Amsterdam 1971); J. RUSSELL, *The "sanatio in radice" before the Council of Trent* (Rome 1964); J. KOENIGSMANN, *Allgemeine Eheheilungen in der Wurzel* (Siegburg 1971); J.Mª GONZÁLEZ DEL VALLE, *Derecho canónico matrimonial*, 3rd ed. (Pamplona 1985), pp. 180ff.
5. Cf. M. LÓPEZ ALARCÓN, "La filiación en el Derecho canónico. Su correspondencia en el Derecho civil," in *Pretor* 97 (1977), p. 25; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), p. 267; R. NAVARRO VALLS, commentary on cc. 1139–1140, in *Pamplona Com.*

1140 **Filii legitimati, ad effectus canonicos quod attinet, in omnibus aequiparantur legitimis, nisi aliud expresse iure cautum fuerit.**

As far as canonical effects are concerned, legitimated children are equivalent to legitimate children in all respects, unless it is otherwise expressly provided by the law.

SOURCES: c. 1117

CROSS REFERENCES: cc. 1137, 1138, 1139

COMMENTARY

Juan Fornés

In current law (see commentary on c .1137), not only are legitimated children equivalent to legitimate children, as expressly provided in this canon, but also legitimate children are equivalent to illegitimate children, inasmuch as "all the effects of illegitimacy have been removed from universal Law."[1] Therefore, if these distinctions and these terms, legitimate, legitimated, illegitimate, are maintained, it is for the purpose of protecting marriage and family, but on the basis of consideration of the *favor prolis* which involves equality and not discrimination for persons, regardless of their origin. Thus it is explained why the prohibitions present in the *CIC* regarding legitimated children have disappeared (see commentary on c. 1137).

1. Cf. *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis polyglottis Vaticanis 1981), p. 264.

CAPUT IX
De separatione coniugum

ART. 1
De dissolutione vinculi

CHAPTER IX
The Separation of Spouses

ART. 1
The Dissolution of the Bond

1141 **Matrimonium ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest.**

A marriage that is ratified and consummated cannot be dissolved by any human power or by any cause other than death.

SOURCES: c. 1118; *CC* 552; PIUS PP. XII, All., 3 oct. 1941 (*AAS* 33 [1941] 424–425); PIUS PP. XII, All., 6 oct. 1946 (*AAS* 38 [1946] 396); *GS* 48

CROSS-REFERENCES: cc. 1055, 1056, 1061, 1085, 1134, 1707, 1142–1150

COMMENTARY

Juan Fornés

1. *Indissolubility of marriage*

One of the essential properties of every marriage is indissolubility. This means that the matrimonial bond unites man and woman in all their

capacity for a conjugal union during the entire life of both spouses[1] (see commentary on cc. 1056 and 1085).

A study of various passages from Holy Scripture and the Fathers of the Church[2] shows that indissolubility is a characteristic of the conjugal bond that, from the beginning, has been present in Christian consciousness and life. It is sufficient to recall Matthew 19: 3–12. In this passage regarding repudiation, Christ, after alluding to the text from Genesis 2: 24 ("Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh"), concludes: "What therefore God has joined together, let no man put asunder."

Indissolubility sinks its deepest roots into the very essence of marriage, because marriage is *una caro* (one flesh).[3] dDivorce directly threatens its very nature. Thus, Christ supported his argument fully on this basis: If the two will be "one flesh," what God hath joined together "let no man separate." Therefore, along these same lines, Christian tradition has insisted that divorce is "against nature, because one flesh (*una caro*) is cut in two (*dissecatur*)";[4] or that it involves "a split in the flesh itself, a split in the body" (*carnem suam scindit, dividit corpus*).[5]

Indissolubility belongs to the doctrine of the faith, as established in cc. 5 and 7 of session 24 of the Council of Trent (Dz.-Sch., 1805 and 1807). Alluding to c. 7 of Trent, Pius XI stressed: "Then if the Church was not and is not mistaken when it taught and teaches these things, it is evidently true that the bond cannot be dissolved even in the case of adultery, and it is clear that other equally futile reasons that may and are usually claimed as a cause for divorce are much less valid and should be absolutely rejected."[6]

Apart from Trent, there are various declarations of the magisterium on indissolubility. It is enough to indicate that Vatican II highlighted the intimate union between *unity* and *indissolubility*: "From the human act by

1. Cf., among others, J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III/1, *Derecho matrimonial* (Pamplona 1973), pp. 65–80 and 306–313; J. FORNÉS, "La indisolubilidad del matrimonio (Notas en torno a un volumen sobre el vínculo conyugal)," in *Ius Canonicum* 18 (1978), pp. 430–470; idem, *Derecho matrimonial canónico* (Madrid 1990), pp. 34ff and 194ff.

2. Cf., e.g., E. SALDÓN, "La indisolubilidad del matrimonio en la Patrística," in *Ius Canonicum* 21 (1971), pp. 113ff; idem, *El matrimonio, misterio y signo (desde el siglo I hasta San Agustín)* (Pamplona 1971); H. CROUZEL, "La indisolubilidad del matrimonio en los Padres de la Iglesia," in *El vínculo matrimonial* (Madrid 1978), pp. 61–116.

3. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, cit., pp. 23–31; J. FORNÉS, *Derecho matrimonial canónico*, cit., pp. 15–20; J.G. ARBOLEDA, "La 'una caro' en la literatura cristiana hasta el siglo XII," in *Excerpta e dissertationibus in Iure Canonico* IV (Pamplona 1987), pp. 9–107.

4. ST. JOHN CHRYSOSTOM, *Homiliae in Mattheum*, homil. LXII, 2 (*PG* 58, 597).

5. ST. AMBROSE, *Expositio Evangelii secundum Lucam*, I, 30 (ed. *Corpus Christianorum*, series latina XIV (Turnholti 1957), p. 21).

6. Cf. PIUS XI, Enc. *Casti connubii*, December 31, 1930: *AAS* 22 (1930), p. 574.

which the partners mutually surrender themselves to each other; for the good of the partners, of the children, and of society this sacred bond no longer depends on human decision alone ... The intimate union of marriage, as a mutual giving of two persons, and the good of the children demand total fidelity from the spouses and require an unbreakable unity between them" (*GS* 48).

In addition, there have been numerous interventions by John Paul II on this subject. For example, in *Familiaris Consortio*, he states: "Conjugal communion is characterized not only by its unity but also by its indissolubility ... It is a fundamental duty of the Church to reaffirm strongly ... the doctrine of the indissolubility of marriage. To all those who, in our times, consider it too difficult, or indeed impossible, to be bound to one person for the whole of life, and to those caught up in a culture that rejects the indissolubility of marriage and openly mocks the commitment of spouses to fidelity, it is necessary to reconfirm the good news of the definitive nature of that conjugal love that has in Christ its foundation and strength. Being rooted in the personal and total self-giving of the couple, and being required by the good of the children, the indissolubility of marriage finds its ultimate truth in the plan that God has manifested in His revelation: He wills and He communicates the indissolubility of marriage as a fruit, a sign and a requirement of the absolutely faithful love that God has for man and that the Lord Jesus has for the Church" (*FC* 20; cf. also *CCC*, 1610–1617, 1643–1651, 2382).

If indissolubility is an essential property of every marriage by virtue of the natural law, it achieves special reinforcement in Christian marriage, due to the particular strength arising from its sacramental nature. Therefore, c. 1056 states that, in Christian marriage, unity and indissolubility "acquire a distinctive firmness by reason of the sacrament."

2. *Dissolution of marriage by death*

A marriage that is ratified and consummated cannot be dissolved other than by death. The term *ratified* refers to sacramental marriage, while *ratified and consummated* refers to sacramental marriage when the spouses have engaged in the conjugal act (cf. c. 1061).

A ratified and consummated marriage is absolutely indissoluble. On the other hand, if a marriage is not ratified or, if a ratified marriage is not consummated, there are some exceptions to the principle of indissolubility, as is the supposition of the Pauline Privilege and others in which in which the *vicarious or ministerial power* of the Roman Pontiff operates in the area of divine law. As noted by Pius XI: "It is not necessary to repeat that a ratified and consummated marriage is indissoluble by divine Law and cannot be dissolved by any human power; on the other hand, other marriages, even when they are *intrinsically* indissoluble, nevertheless do

not have an absolute *extrinsic* indissolubility, but rather, given certain necessary suppositions (as is known, they are relatively rare cases), they can be dissolved, not only by virtue of the Pauline privilege, but also by the Roman Pontiff by virtue of his *ministerial power*."[7]

It is important to distinguish between intrinsic indissolubility and extrinsic indissolubility. The former refers to the fact that the bond cannot be dissolved by the will of the spouses, and it is absolute. The latter indicates that there is no authority that can dissolve marriage. It is absolute in the case of a ratified and consummated marriage; in all other cases, there are some exceptions.

One line of doctrine has sought to weaken the absolute indissolubility of a ratified and consummated marriage, either by redefining the concept of "ratified," that is, the sacramental nature, or redefining the concept of "consummation."[8] These proposals have not received any acceptance,[9] nor have the suggestions[10] related to the extension of the power of the Roman Pontiff regarding the dissolution of a ratified and consummated marriage.[11]

Once the indissolubility is affirmed in this way, c. 1141 sets forth the case of the normal dissolution of marriage, through the death of one of the spouses. This cause of extinction does not present any major problems, except when there is no reliable evidence of the death. In canon law, there is no legal presumption of death due to a prolonged absence from the spouse, nor a truly dissolving declaration of death, as in state systems.[12] Instead, it is necessary to hold an extra-judicial investigation on the alleged death of the spouse, through which the diocesan bishop must reach

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7. *Allocution* of PIUS XII to the Roman Rota, October 3, 1941: *AAS* 33 (1941), pp. 424–425.

8. E.g., J. BERNHARD, "Reinterprétation (existentielle et dans la foi) de la législation canonique concernant l'indissolubilité du mariage chrétien," in *Revue de Droit canonique* 21 (1971), pp. 243–277; J.T. FINNEGAN, "When is a marriage indissoluble?" in *The Jurist* 28 (1968), pp. 309–320; P. HUIZING, "Indisolubilidad matrimonial y regulaciones de la Iglesia," in *Concilium* 38, sept. -Oct. 1968, pp. 202ff.

9. Cf. *Comm* 10 (1978), pp. 107–108; U. NAVARRETE, "Indissolubilitas matrimonii rati et consummati: Opiniones recentiores et observationes," in *Periodica* 1969, pp. 415ff; idem, "De notione et effectus consummationis matrimonii," in *Periodica* 1970, pp. 650 ff; A. BERNÁRDEZ, "El divorcio en el Concilio Vaticano II y en la doctrina actual. Tendencias divorcistas actuales: crítica," in *El vínculo matrimonial* (Madrid 1978), pp. 515–577.

10. E.g., A. BRIDE, "L'actuelle extension du privilège de la foi," in *L'Année canonique* (1958–1959), pp. 53–81; idem, "Le pouvoir du Souverain Pontifice sur le mariage des infidèles," in *Revue de Droit canonique* 10–11 (1960–1961); R. CHARLAND, "Le pouvoir de l'Église sur les liens de mariage," in *Revue de Droit canonique* 16 (1966), pp. 44–57 and 17 (1967), pp. 31–46.

11. Cf. *Comm* 10 (1978), pp. 107–108; A. BERNÁRDEZ, "El divorcio...," cit., pp. 515 ff, especially pp. 554–557. Cf., finally, CCE, 1640.

12. Cf., e.g., art. 85 of the *Código civil español*.

moral certainty of the death and declare that it has occurred. This procedure is regulated in c. 1707.[13]

The declaration of alleged death allows the spouse to contract a new marriage. But, if the spouse who disappeared has not truly died, the first bond would subsist and the second marriage would be null, although, it would have the effects of a putative marriage (cf. c. 1061 § 3).

13. In the previous discipline, this question was regulated by the Instr. *Matrimonii vinculo*, May 13, 1868 (*CIC, Fontes*, IV, pp. 306–309). Cf. M. SAID, "De processu praesumptae mortis coniugis," in *«Dilexit iustitiam». Studi in onore di A. Card. Sabattani*, (Vatican City 1984); R. MELLI, *Il processo di morte presunta*, in *I procedimenti speciali nel diritto canonico* (Lib. Ed. Vat. 1992), pp. 217ff.

1142 Matrimonium non consummatum inter baptizatos vel inter partem baptizatam et partem non baptizatam a Romano Pontifice dissolvi potest iusta de causa, utraque parte rogante vel alterutra, etsi altera pars sit invita.

A non-consummated marriage between baptized persons or between a baptized party and an unbaptized party can be dissolved by the Roman Pontiff for a just reason, at the request of both parties or of either party, even if the other is unwilling.

SOURCES: c. 1119

CROSS-REFERENCES: cc. 1055, 1056, 1061, 1085, 1141, 1143–1150, 1697–1706

COMMENTARY

Juan Fornés

1. Presumptions on the dissolution of marriage

Canon 1141 establishes the absolute indissolubility of a sacramental, non-consummated marriage. If these two elements are not present, dissolution is possible through the Pope's exercise of his vicarious power in the area of divine law: proper power only of God (who acts as the principal cause), and vicarious power on the part of the Pope (who functions as the instrumental cause) (see commentary on c. 1141).

Recent doctrine refers to the general exercise of the *potestas sacra* by the Pope, not the exercise of a specific vicarious power other than the sacred power the Pope possesses by virtue of his office.[1] From this point of view, every power possessed by the Roman Pontiff is vicarious: he is properly the Vicar of Christ on earth. One sector of doctrine has paid particular attention to these issues, while trying to harmonize it with the broad vision of the canonists and theologians of the Middle Ages and the 16th century. It speaks of "considering the Pope as a vicar of God the Creator and of Christ

1. Cf., e.g., U. NAVARRETE, "Potestas vicaria Ecclesiae: Evolutio historica conceptus atque observationes attenta doctrina Concilii Vaticani II," in *Periodica* 60 (1971), pp. 419ff; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), pp. 298–299; R. BURKE, "Il processo di dispensa dal matrimonio rato e non consummato: la grazia pontificia e la sua natura," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 135ff, with the appropriate bibliographical references.

the Redeemer, who has a particular relationship with all men, as creatures of God and as the redeemed of Christ, and with natural law, in that he is its custodian and interpreter, with the faculty to be able to dispense with it in particular cases, if required for the good of the souls."[2]

Theological and juridical doctrine has not provided an explanation that treats all the points questioned in this specific supposition of dissolution of marriage and others regulated in this article of the Code. It would not be easy to do, if one attempts to take into consideration only the information on the scientific-technical plane or the historic plane. In this regard, various decretals of Alexander III are cited, some of them subject to study and discussion due to their doubtful interpretation.[3] It is a subject in which information characteristic of faith, which rests on the safe guidance of the Magisterium and of Church practice, comes into play. Thus, the true reason for these suppositions of dissolution is their constant practice on the part of the Pope; all the other reasons provided are entirely consistent.[4]

After the controversies on the Roman Pontiff's power to dissolve a non-consummated marriage, Clement VIII appointed a special commission, made up of Cardinals Ascoli, Bianchetto, Mantica, Arrigone, Visconti, d'Ossat, Borghese and Belarmino, the Rotal auditors Pamphili, Pegna and Mellino, and the Jesuits Giustiani and Costa. The opinion submitted on July 16, 1599 was a unanimous declaration that the Pope possesses this power.[5]

In short, the points that must be taken into account regarding the Roman Pontiff's power to dissolve marriages, as raised by doctrine,[6] are the following:

1) The Roman Pontiff may dissolve a marriage between two baptized persons or between a baptized person and a non-baptized person, if it has not been consummated, and a marriage between two non-baptized persons.

2) A sacramental marriage that has been consummated is absolutely indissoluble.

3) As to why the Roman Pontiff is the only authority that can dissolve a marriage, "the answer, always according to Catholic doctrine, is

2. U. NAVARRETE, "Privilegio de la fe: Constituciones pastorales del siglo XVI. Evolución posterior de la práctica de la Iglesia en la disolución del matrimonio de infieles," in *El vínculo matrimonial. ¿Divorcio o indisolubilidad?* (Madrid 1978), p. 303.

3. Cf., e.g., E. SAURWEIN, *Der Ursprung des Rechtsinstitutes der Päpstlichen Dispens von der nicht vollzogenen Ehe* (Rome 1980).

4. Cf. L. MIGUÉLEZ, commentary on cc. 1118–1127, in A. ALONSO-L. MIGUÉLEZ-S. ALONSO, *Comentarios al Código de Derecho canónico*, II (Madrid 1963), p. 690.

5. Cf. G.H. JOYCE, *Christian marriage: an historical and doctrinal study*, 2nd ed. (London 1948), p. 449.

6. Cf. *El vínculo matrimonial. ¿Divorcio o indisolubilidad?* (Madrid 1978). See also the commentary of J. FORNÉS, "La indisolubilidad del matrimonio (Notas en torno a un volumen sobre el vínculo conyugal)," in *Ius Canonicum* 18 (1978), pp. 443–470; idem, *Derecho matrimonial canónico* (Madrid 1990), pp. 194ff.

this: the Pope possesses double authority, conferred by Christ: on the one hand, he is the head of the Church founded by Christ, and as a result, he governs the members of this Church; on the other hand, he is the Vicar of God on earth to exercise in His name the authority that God possesses over all men, whether or not they are baptized, whether or not they believe in Him. It is by virtue of this second power how the Pope interprets natural Law, which is law for all of humanity; and it is by virtue of this second power how he dissolves the marriage of those who do not belong to the Church, because the law of indissolubility, with its exceptions, is not an ecclesiastical, but a natural law."[7]

4) Regarding the *limit* of papal power for dissolution of marriage, this limit is the consummated sacramental marriage. This is based on two important facts: the practice of the exercise of pontifical power and the repeated doctrinal and magisterial formulations regarding the absolute indissolubility of a ratified and consummated marriage.

In connection with some critical approaches in this regard, "just because the Popes have not exercised a power for centuries, it does not mean that they do not possess it; but the fact that they have affirmed with sufficient continuity and solemnity that it has not been conferred by Christ will mean that they do not possess it."[8] This statement is also found in the 1917 and 1983 Codes for the Latin Church and in the 1990 Code for the Eastern Churches, which indicate that ratified and consummated marriage is not dissolved except by death (c. 1118 *CIC*/1917, c. 1141 *CIC* and c. 853 *CCEO*). The Catechism, for its part, states at 1640: "Thus the marriage bond has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable, and gives rise to a covenant guaranteed by God's fidelity. The Church does not have the power to contravene this disposition of divine wisdom (cf. *CIC* can. 1141)."

5) With respect to the *basis* of the absolute indissolubility of a ratified and consummated marriage, in contrast to the possibility of dissolution in other marriages, the specialists have not yet offered an entirely satisfactory explanation. This is logical, if one bears in mind that this is a subject in which the sacramental nature of marriage comes into play and in which, therefore, there are facts of faith that exceed purely speculative human limits. We are in the very field of mystery, in which the magisterial teachings are decisive.

7. A. DE LA HERA, "Indisolubilidad y consumación del matrimonio," in *Revue de Droit canonique* 2 (1976), p. 362.

8. Ibid., p. 365. Cf. A. BERNÁRDEZ, "El divorcio en el Concilio Vaticano II y en la doctrina actual. Tendencias divorcistas actuales: crítica," in *El vínculo matrimonial...*, cit., pp. 556–557; J. FORNÉS, "La indisolubilidad...," cit., pp. 443ff, especially pp. 465–470.

Nevertheless, from a juridical point of view, some clues can be provided. The first highlights the importance of consummation in sacramental marriage by considering consummation as a juridical category ("a *juridical fact*, which strengthens the indissolubility of the bond"[9]) that affects sacramental marriage, to the extent that it contributes to the sacramental symbol. Hervada stresses: "It is not a transaction consummation but rather a *sacramental* consummation. The characteristic firmness that, due to the sacramental nature, is brought about by the first conjugal act is not in the order of the consummation of juridical transactions, but in a singular order of efficacy that cannot be reduced to the usual categories of the effects of the consummation of real or consensual juridical transactions."[10]

The second considers indissolubility in light of the essence of marriage as *one flesh*: "the significance of a consummated marriage does not lie anywhere but in the very fact that the spouses have ontologically expressed themselves as *one flesh*, a reality similar to the union between Christ and the Church through Incarnation."[11] It also considers the inseparability between marriage and sacrament: "The fullness of the significance creates a correctness of the juridical value of the bond, attributing to it a firmness that it does not have only because of the pact, giving it an indissolubility that makes it similar to the indestructible union of Christ with the Church."[12]

2. *Dissolution of a non-consummated marriage*

During the work of revising the Code, some asked that the faculty to dispense in the case of a ratified and non-consummated marriage be given to the bishops. At the very least, it was requested that, in c. 1142, the text state *ab auctoritate ecclesiastica*, so discussions regarding vicarious power and its delegation could remain open. However, while some consultors believed that this power also belongs to the bishops, "nevertheless, everyone wants the current provision to be maintained, that is, for the faculty to be reserved for the Roman Pontiff."[13] This, it seems clear that the power to dissolve only belongs to the Roman Pontiff, as the Vicar of Christ on earth, with the proper and exclusive fullness of his office.

Canon 1142 does not treat a dispensation in the technical sense of a relaxation of a merely ecclesiastical law in a specific case (c. 85). Instead, it deals with the dispensation *super rato*, in which the Roman Pontiff

9. J. HERVADA, "El matrimonio canónico. Teoría general," in *Derecho canónico* (Pamplona 1975), p. 394.
10. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, III/1, *Derecho matrimonial* (Pamplona 1973), p. 303.
11. Ibid., p. 303.
12. Ibid., p. 304.
13. Cf. *Comm* 10 (1978), p. 108.

makes the conjugal bond dissolve by his vicarious power. Therefore, it is a dispensation in the broad and extensive sense, not in the strict or technical-juridical sense.

The fundamental points that should be taken into account in connection with c. 1142 are the following:

1) It must be a marriage between baptized persons or between a baptized party and a non-baptized party.

2) There must be a "just cause" for the validity of the dissolution, inasmuch the Roman Pontiff exercises a vicarious power in the area of divine law, which is subject to this demand or requirement by its very nature. "Just causes" could be unintentional supervening impotence after the celebration of marriage; a grave aversion between the parties, without hope of reconciliation; civil marriage attempted by one of the parties with a third person; a defect of form or consent, or an impediment not sufficiently proven for the declaration of nullity; etc.[14]

3) The act of consummation is a necessary presupposition, in that consummation is the human performance of the conjugal act suitable in itself to create offspring, for which marriage was designed by its very nature and through which the spouses become one flesh.

4) Lastly, the procedure for the dispensation of non-consummated marriage is regulated in cc. 1697–1706. It is a process of an administrative nature. The Norms of the Congregation of the Sacraments contained in *Litterae circulares "De processu super matrimonio rato et non consummato,"* of December 20, 1986[15] should be taken into account. There are previous norms (for example, the Instruction *Dispensationis matrimonii*, of March 7, 1972)[16] which should make up this regulation, if they are consistent with the juridical system as a whole in this area.

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14. Cf., A. ABATE, *Lo scioglimento del vincolo coniugale* (Rome 1961); J. CASSORIA, *De matrimonio rato et non consummato* (Rome 1959); E. MAZZACANE, *La 'justa causa dispensationis' nello scioglimento del matrimonio per inconsumazione* (Milan 1963); A. MOLINA MELIÁ, *La disolución del matrimonio inconsumado. Antecedentes históricos y Derecho vigente* (Salamanca 1987); C. SECO, "El texto y el contexto del can. 1142 del nuevo CIC," in *Revista Española de Derecho Canónico* 40 (1984), pp. 25ff; J.L. SANTOS, "La potestad ministerial en el ordenamiento canónico," in *Ius Canonicum* 5 (1965), pp. 63ff; G. ORLANDI, *I 'casi difficili' nel processo super rato* (Padova 1984); R. BURKE, "Il processo di dispensa...," cit., pp. 135 ff.

15. Cf. in *Comm* 20 (1988), pp. 78–84. One can consult, among others, O. BUTTINELLI, "L'attuale procedura nelle cause di dispensa 'super rato et non consummato,'" in *Il processo matrimoniale canonico*, (Vatican City 1988), pp. 429ff; F. LÓPEZ ZARZUELO, "La Carta circular 'De processu super matrimonio rato et non consummato.' Texto y comentario," in *Revista Española de Derecho Canónico* 125 (1988), pp. 535ff; idem, *El proceso canónico de matrimonio rato y no consumado* (Valladolid 1991); G. ORLANDI, "Recenti innovazioni nella procedura 'super matrimonio rato et non consummato,'" in *Il processo matrimoniale canonico* (Vatican City 1988), pp. 447ff; *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 107–156.

16. *AAS* 64 (1972), pp. 244–252.

1143 **§ 1. Matrimonium initum a duobus non baptizatis solvitur ex privilegio paulino in favorem fidei partis quae baptismum recepit, ipso facto quo novum matrimonium ab eadem parte contrahitur, dummodo pars non baptizata discedat.**

§ 2. Discedere censetur pars non baptizata, si nolit cum parte baptizata cohabitare vel cohabitare sine contumelia Creatoris, nisi haec post baptismum receptum iustam illi dederit discedendi causam.

§ 1. In virtue of the Pauline privilege, a marriage entered into by two unbaptized persons is dissolved in favour of the faith of the party who received baptism, by the very fact that a new marriage is contracted by that same party, provided the unbaptized party departs.

§ 2. The unbaptized party is considered to depart if he or she is unwilling to live with the baptized party, or to live peacefully without offence to the Creator, unless the baptized party has, after the reception of baptism, given the other just cause to depart.

SOURCES: § 1: cc. 1120, 1126
§ 2: cc. 1123, 1124

CROSS REFERENCES: cc. 1055, 1056, 1085, 1141, 1142, 1144–1150

COMMENTARY

Juan Fornés

This canon and canons 1144–1147 regulate the Pauline privilege, the origin of which is a passage from the first epistle of St. Paul to the Corinthians: "To the rest I say, not the Lord, that if any brother has a wife who is an unbeliever, and she consents to live with him, he should not divorce her. If any woman has a husband who is an unbeliever, and he consents to live with her, she should not divorce him. For the unbelieving husband is consecrated through his wife, and the unbelieving wife is consecrated through her husband. Otherwise, your children would be unclean, but as it is they are holy. But if the unbelieving partner desires to separate, let it be so; in such a case, the brother or sister is not bound. For God has called us to peace" (1 Cor 7:12–15).

The Pauline privilege is the possibility of dissolution of the marriage of two unbaptized persons, when one later becomes baptized, in favor of the faith of the baptized party. This dissolution takes place *ipso facto*

when the baptized party enters a new marriage, once the requirements considered below are met.[1]

Doctrine has stressed that the expression of St. Paul ("To the rest I say, not the Lord") is not referring to a "personal" exception to the principle of indissolubility. Instead, it is a promulgation of an exception to divine law through the apostolic authority it possesses, such that it applies the power received from God to the unjust abandonment of the baptized party by the unbaptized party. At the same time, it has also been stressed that the Pauline expression on separation does not merely refer to a discontinuation of conjugal cohabitation, but to a true dissolution of the bond when the baptized person contracts a new marriage.[2]

The decretals *Quanto*[3] and *Gaudemus*[4] of Innocence III sum up the principles and norms in this area. For example, *Quanto* states: "If one of the unfaithful spouses converts to the Catholic faith and the other does not want in any way to cohabit, or at least not without blasphemy of the divine name, or to lead him or her to mortal sin, the one who is abandoned may, if he or she wishes, remarry, and in this case we understand what the Apostle says: 'But if the unbelieving partner desires to separate, let it be so; in such a case the brother or sister is not bound.'"[5]

The structure of the Pauline privilege comes down to these five points[6]:

1) Two unbaptized persons must have celebrated the marriage.

2) One of them must become validly baptized in the Catholic Church or in another church or ecclesial community.[7]

3) There must be a separation (*discessus*) initiated by the unbaptized party. This separation can be physical (the party does not wish to cohabit) or moral (despite wanting to cohabit, he or she does not do so *sine*

1. Cf., M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), pp. 303ff, with bibliographical references; U. NAVARRETE, "Privilegio de la fe: Constituciones pastorales del siglo XVI. Evolución posterior de la práctica de la Iglesia en la disolución del matrimonio de infieles," in *El vínculo matrimonial* (Madrid 1978), pp. 242ff, which in p. 239 presents a bibliography on this issue and its interpretation in the Middle Ages; G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del 'privilegio paolino,'" in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 157ff, with the "Nota bibliográfica" on pp. 175–177; A. SILVESTRELLI, *Scioglimento di matrimonio in favorem fidei*, ibid., pp. 179ff, especially pp. 180–181 and bibliography in p. 216 (see also commentary on c. 1142).

2. Cf. among others, U. NAVARRETE, "Privilegio de la fe...," cit., pp. 239ff, with the appropriate bibliographical references.

3. *X* 4, 19, 7.

4. *X* 4, 19, 8.

5. Cf. *X* 4, 19, 7.

6. Cf., e.g., J. FORNÉS, *Derecho matrimonial canónico* (Madrid 1990), pp. 199–200, and the "Indicaciones bibliográficas" on pp. 215–217.

7. Cf. *Comm.* 10 (1978), p. 109.

contumelia Creatoris).[8] Moral separation can consist of a threat to the freedom of the baptized person to practice his or her religion, inducement to sin, unchaste conjugal life, opposition to the Christian education of the children, threats to the faith of the converted party, polygamy, abuse, or similar conduct.

According to § 2 of c. 1143, the unbaptized party must initiate the separation and the baptized party cannot have given a just cause to separate.

4) There is a need for interpellations, as regulated in cc. 1144 and 1145.

5) The immediate effect of the Pauline privilege is the baptized spouse's right to enter a new marriage with a Catholic, as provided in c. 1146 (see c. 1147 and commentary). The intermediate effect is the dissolution of the marriage celebrated in unbelief, which takes place at the same time that the new union is contracted. As indicated in c. 1143, the marriage is dissolved "in favour of the faith of the party who received baptism, by the very fact that that same party contracts a new marriage ..."[9]

8. Cf. ibid., pp. 109–110.
9. Cf. also *Comm.* 10 (1978), p. 109.

1144 **§ 1. Ut pars baptizata novum matrimonium valide contrahat, pars non baptizata semper interpellari debet an:**
1° velit et ipsa baptismum recipere;
2° saltem velit cum parte baptizata pacifice cohabitare, sine contumelia Creatoris.

§ 2. Haec interpellatio post baptismum fieri debet; at loci Ordinarius, gravi de causa, permittere potest ut interpellatio ante baptismum fiat, immo et ab interpellatione dispensare, sive ante sive post baptismum, dummodo constet modo procedendi saltem summario et extraiudiciali eam fieri non posse aut fore inutilem.

§ 1. For the unbaptized person validly to contract a new marriage, the unbaptized party must always be interpellated whether:
1° he or she also wishes to receive baptism;
2° he or she at least is willing to live peacefully with the baptized party without offence to the Creator.

§ 2. This interpellation is to be done after baptism. However, the local Ordinary can for a grave reason permit that the interpellation be done before baptism; indeed he can dispense from it, either before or after baptism, provided it is established, by at least a summary and extrajudicial procedure, that it cannot be made or that it would be useless.

SOURCES: § 1: c. 1121 § 1
§ 2: c. 1121 § 2; *PM* I, 23

CROSS-REFERENCES: cc. 1141–1143, 1145–1150

COMMENTARY

Juan Forné

In connection with the preceding canon, cc. 1144 and 1145 regulate the interpellation that must be made to the unbaptized spouse to prove the existence of the necessary presuppositions for the Pauline privilege to operate. In c. 1144, the points on which the interpellation must be made and the time when the interpellation must be made, are clearly set forth.[1]

1. Cf. *Comm.* 10 (1978), pp. 110–111. One can consult G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del 'privilegio paolino,'" in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 163–167.

Interpellation is a means of evidence provided by the legislator so that there may be evidence of the intentions of the unbaptized party in the external forum. Therefore, it is a means of positive human law and can be dispensed, as established in § 2 of c. 1144. On the other hand, the need for the unbaptized party's separation comes from divine law, along with the need for the existence of moral certainty regarding this attitude.

It should be stressed that, although interpellation is a requirement established by positive human law, it affects the validity of a possible new marriage, as can be clearly deduced from § 1 of c. 1144 and from c. 1146.

Consequently, if interpellation is impossible or useless, and this is attested to by "at least a summary and extra-judicial procedure," it may be dispensed. Therefore, it is not sufficient for the ordinary to be personally convinced of the impossibility or uselessness. Instead, the investigation must be carried out, so "this need will appear for all future time, either because the interpellated party does not respond, because his or her whereabouts are not known, or because he or she has given evidence through acts of his or her open opposition."[2]

2. SCSO, June 11, 1760, in *Collectanea S. Congregationis de Propaganda Fide*, vol. I (Rome 1907), n. 430. Cf.. G. GIROTTI, "La procedura...," cit., which cites this and other documents.

1145 **§ 1. Interpellatio fiat regulariter de auctoritate loci Ordinarii partis conversae; a quo Ordinario concedendae sunt alteri coniugi, si quidem eas petierit, induciae ad respondendum, eodem tamen monito ut, si induciae inutiliter praeterlabantur, eius silentium pro responsione negativa habeatur.**

§ 2. Interpellatio etiam privatim facta ab ipsa parte conversa valet, immo est licita, si forma snperius praescripta servari nequeat.

§ 3. In utroque casu de interpellatione facta deque eiusdem exitu in foro externo legitime constare debet.

§ 1. As a rule, the interpellation is to be done on the authority of the local Ordinary of the converted party. A period of time for reply is to be allowed by this Ordinary to the other spouse, if indeed he or she asks for it, warning the person however that if the period passes without any reply, silence will be taken as a negative response.

§ 2. Even an interpellation made privately by the converted party is valid and lawful if the form prescribed above cannot be observed.

§ 3. In both cases, there must be lawful proof in the external forum of the interpellation having been done and of its outcome.

SOURCES: § 1: c. 1122 § 1
§ 2: c. 1122 § 2
§ 3: c. 1122 § 2

CROSS-REFERENCES: cc. 1141–1144, 1146–1150

COMMENTARY

Juan Fornés

This canon refers to the ways in which the interpellation must be handled: a regular form and a supplementary form. The first is handled "on the authority of the local Ordinary" of the converted party "as a rule." The second is carried out privately by the converted party when the first method cannot be observed. Both are valid, but the second method is only licit when it is impossible to perform interpellation with the intervention of the ordinary.

With respect to a negative response from the interpellated party, it can take place in the act, or after a period of time, if requested. In turn, in

this case, the response may be express or tacit, inasmuch as silence once the term expires— is understood as a negative response.

It is enough to perform interpellation once, although it can be done more than once *ex mera caritate.*[1]

For there to be lawful proof in the external forum of the interpellation and its result, the various means of proof may be used, especially documentary evidence and, when applicable, testimony.

1. Cf. SCSO, June 12, 1850, in *Collectanea S. Congregationis de Propaganda Fide* (Rome 1907), vol. I, n. 1044, ad 1. Also in *CIC Fontes*, IV, n. 910.

1146 **Pars baptizata ius habet novas nuptias contrahendi cum parte catholica:**

1° si altera pars negative interpellationi responderit, aut si interpellatio legitime omissa fuerit.

2° si pars non baptizata, sive iam interpellata sive non, prius perseverans in pacifica cohabitatione sine contumelia Creatoris, postea sine iusta causa discesserit, firmis praescriptis cann. 1144 et 1145.

The baptized party has the right to contract a new marriage with a catholic:

1° if the other party has replied in the negative to the interpellation, or if the interpellation has been lawfully omitted;

2° if the unbaptized person, whether already interpellated or not, who at first persevered in peaceful cohabitation without offence to the Creator, has subsequently departed without just cause, without prejudice to the provisions of Cann. 1144 and 1145.

SOURCES: cc. 1123, 1124

CROSS-REFERENCES: cc. 1141–1145, 1147–1150

COMMENTARY

Juan Fornés

This canon sets forth the immediate effect of the Pauline privilege (the baptized spouse's right to contract a new marriage with a Catholic), and the mediate effect (dissolution of the prior marriage, which takes place at the same time that the new marriage is contracted).[1]

The canon indicates the necessary conditions for this to take place, considering three possibilities: *a)* a negative reply to the interpellation, *b)* dispensation of the interpellation in accordance with the provisions of c. 1144, and *c)* separation (*discessus*), without just cause, by the unbaptized party *a posteriori*. In the last situation, the provisions of cc. 1144–1145 must be observed to discern the unbaptized party's present wishes and to have evidence of these wishes in the external forum.[2]

1. Cf. *Comm.* 10 (1978), p. 109.
2. Cf. ibid., pp. 111–113.

1147 **Ordinarius loci tamen, gravi de causa, concedere potest ut pars baptizata, utens privilegio paulino, contrahat matrimonium cum parte non catholica sive baptizata sive non baptizata, servatis etiam praescriptis canonum de matrimoniis mixtis.**

However, the local Ordinary can for a grave reason allow the baptized party, using the Pauline privilege, to contract marriage with a non-Catholic party, whether baptized or non-baptized; in this case, the provisions of the canons on mixed marriages must also be observed.

SOURCES: *PM* I, 20

CROSS REFERENCES: cc. 1055, 1056, 1061, 1078, 1085, 1086, 1124–1129, 1134, 1141–1146, 1148–1150

COMMENTARY

Juan Fornés

The main innovation on the Pauline privilege in the current Code is the case treated in this canon, which refers to the baptized person's ability to contract a new marriage with a non-Catholic, whether baptized or unbaptized. The immediate precedent to this legal provision is no. 20 of *Pastorale Munus*, according to which the diocesan bishop has the authority "to dispense, if there is a just and grave reason, with the impediments of mixed religion and disparity of cult, even in the case of use of the 'Pauline privilege', except for the provisions of cc. 1061–1064 of the Code of Canon law."

Canon 1147 states that the local ordinary can allow (*concedere potest*) the baptized party to contract a new marriage with a non-Catholic. This possibility is contemplated and regulated,[1] but not as a right, which occurs when one seeks to marry a Catholic. According to c. 1146, the immediate effect of the Pauline privilege is that "the baptized party has the right to contract a new marriage with a Catholic."

For the baptized party in a Pauline privilege case to marry a non-Catholic, the local ordinary's concession is necessary. From this perspective, it may appear that this is inconsistent with the Pauline privilege, although c. 1147 and *Pastorale Munus* both refer to the use of this privilege (*utens privilegio paulino*) in this case.[2]

1. Cf. *Comm.* 10 (1978), pp. 112–113.
2. Cf. ibid., pp. 112–113.

There are three essential prior conditions for dissolution of the bond through the Pauline privilege: *a)* marriage between two unbaptized persons, *b)* baptism of one of the spouses, *c)* lawfully verified physical or moral separation (*discessus*) by the unbaptized party.[3]

When the baptized party seeks to marry a non-Catholic, the problem lies in the need for dispensation of the impediment of disparity of cult (c. 1086) or permission from the competent authority (cc. 1124–1128), depending on whether the non-Catholic is baptized or unbaptized. There is also the need to guarantee the faith of the baptized party, since this is the underlying reason for the Pauline privilege.

The *CIC*/1917 reserved the dispensation of the impediments of disparity of cult (cc. 1070–1071 regarding the impediment and c. 1040 regarding dispensations) and mixed religion (cc. 1060–1064 regarding the impediment and c. 1040 regarding its dispensation) to the Holy See. In the current Code, the impediment of disparity of cult can be dispensed with by the local ordinary, who may also grant permission for a mixed marriage[4] (c. 1125). The local ordinary may do the same for marriages contracted based on the Pauline privilege,[5] provided that the faith of the baptized party is guaranteed, and there is a grave reason (such as a limited number of Catholics in a given area).

The faith of the baptized party is fully guaranteed by "observing the provisions of the canons on mixed marriages." This indicates that the *cautiones* described in cc. 1125–1126 are to be furnished. It is the guarantee of the faith of the baptized party that is the fundamental reason for the Pauline privilege (*in favorem fidei*).[6]

3. Cf., e.g., G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del 'privilegio paolino,'" in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 167–168.
4. Cf. J. FORNÉS, *Derecho matrimonial canónico* (Madrid 1990), pp. 50ff and 161–164.
5. Cf., among others, G. GIROTTI, "La procedura...," cit., p. 168.
6. Cf. J. FORNÉS, *Derecho matrimonial canónico*, cit., pp. 199–200.

1148 **§ 1. Non baptizatus, qui plures uxores non baptizatas simul habeat, recepto in Ecclesia catholica baptismo, si durum ei sit cum earum prima permanere, unam ex illis, ceteris dimissis, retinere potest. Idem valet de muliere non baptizata, quae plures maritos non baptizatos simul habeat.**

§ 2. In casibus de quibus in § 1, matrimonium, recepto baptismo, forma legitima contrahendum est, servatis etiam, si opus sit, praescriptis de matrimoniis mixtis et aliis de iure servandis.

§ 3. Ordinarius loci, prae oculis habita condicione morali, sociali, oeconomica locorum et personarum, curet ut primae uxoris ceterarumque dimissarum necessitatibus satis provisum sit, iuxta normas iustitiae, christianae caritatis et naturalis aequitatis.

§ 1. When an unbaptized man who simultaneously has a number of unbaptized wives, has received baptism in the catholic Church, if it would be a hardship for him to remain with the first of the wives, he may retain one of them, having dismissed the others. The same applies to an unbaptized woman who simultaneously has a number of unbaptized husbands.

§ 2. In the cases mentioned in § 1, when baptism has been received, the marriage is to be contracted in the legal form, with due observance, if need be, of the provisions concerning mixed marriages and of other provisions of law.

§ 3. In the light of the moral, social and economic circumstances of place and person, the local Ordinary is to ensure that adequate provision is made, in accordance with the norms of justice, Christian charity and natural equity, for the needs of the first wife and of the others who have been dismissed.

SOURCES: § 1: c. 1125; CodCom Resp. 1, 26 ian. 1919; CodCom Resp., 3 aug 1919; SCHO Resp., 30 iun. 1937
§ 2: SCHO Resp., 30 iun. 1937

CROSS REFERENCES: cc. 1055, 1056, 1061, 1085, 1086, 1108–1122, 1124–1129, 1134, 1141–1147, 1149, 1150

COMMENTARY

Juan Fornés

This canon regulates a phenomenon that has its precedent in the constitutions of Paul III (*Altitudo* of June 1, 1537) and Pius V (*Romani Pontificis* of August 2, 1571). These texts, together with Gregory XIII's *Populis* of January 25, 1585 (see commentary on c. 1149), were incorporated into the *CIC*/1917 by c. 1125, which provided that the provisions on marriage contained in them, "which were given for certain places, are also extended to other regions in the same circumstances." These texts sought to solve a problem that arose during the geographical discoveries of the fifteenth century and subsequent evangelization, namely the existence of polygamous unions.[1]

For example, *Altitudo* was directed to the territories of the Western and Southern Indies (*universis Episcopis Occidentalis et Meridionalis Indiae*) and spoke of the *incolae occidentalis et meridionalis Indiae*, reflecting the division of the world made by Alexander VI in the bull *Inter caetera* of May 4, 1493.[2] *Altitudo* provides that "those persons who before conversion had, according to their customs, more than one wife and cannot remember which was the first wife they had, once converted to the faith, shall take one of them, whichever they want, in order to contract marriage with her through a promise to marry, as is customary, and those persons who can remember which wife they took first, must retain this latter wife, separating from the others. We also grant, if they are related even to the third degree of consanguinity or of kinship, that they may not be prevented from marrying unless this Holy See provides otherwise ..."

The constitution *Romani Pontificis* indicates that "spontaneously and for certain, and from the fullness of apostolic power, according to the present letters, we declare with apostolic authority that the Indians who

1. Cf., among others, RAYANA PUTHOTA, *De constitutione S. Pii Papae V 'Romani Pontificis,'* August 2, 1571 (Naples 1958); A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico*, 7th ed. (Madrid 1991), pp. 292ff; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado*, 4th ed. (Madrid 1992), pp. 306 ff; J. FORNÉS, *Derecho matrimonial canónico* (Madrid 1990), pp. 194 ff, with the bibliographical references cited by these authors and, specifically, in the last cited work on pp. 215–217; F.R. AZNAR, "El matrimonio en Indias; recepción de las decretales X, 4,19,7–8," in *Revista de Estudios Histórico-Jurídicos* 11 (1986), pp. 13 ff.

2. Cf. U. NAVARRETE, "Privilegio de la fe: Constituciones pastorales del siglo XVI. Evolución posterior de la práctica de la Iglesia en la disolución del matrimonio de infieles," in *El vínculo matrimonial* (Madrid 1978), pp. 258–259, with the bibliographical references on pp. 239–240.

are already baptized ... and any who are baptized hereafter, may remain, as with a lawful wife, separating from the others, with the wife who has been baptized or is baptized with them, and that said marriage between them is a firm and lawful marriage, and they must be thus judged and defined by any judge or commissioner regardless of his or her authority, with each and every one of them deprived of any faculty or authority to judge and interpret otherwise; and should it occur that someone, regardless of his or her authority, knowingly or due to ignorance, should attempt to act against what is herein provided, we decree that it must be null and void, notwithstanding ..."

Assuming the apostolic power of the Roman Pontiff to dissolve any marriage that is not ratified and consummated, the evolution of the exercise of this power in this case is clear. There was a determination of the conditions for the marriage to be dissolved *ipso facto* in Innocent III's *Quanto* (*X* 4, 19, 7) and *Gaudemus* (*X* 4, 19, 8), and in the constitutions of Paul III and Pius V. Precise regulation of the Pauline privilege followed, culminating in the present canonical norms, as well as the concession of certain special faculties to dispense with some requirements of law in the constitution of Gregory XIII (see commentary on c. 1149). Finally, there developed the possibility of dissolution granted by the Roman Pontiff, according to a practice subsequent to the *CIC*/1917 for phenomena not regulated in it.[3]

In addition to the cases also set forth in the current *CIC*, one should add the phenomenon of dissolution of non-sacramental marriages through an express concession of the Roman Pontiff. During the preparatory work for the *CIC*, there was a draft provision related to this issue, which was included in the *Schema novissimum* of 1982.[4] However, it was not included in the *CIC*, and it remains treated only by the *Instructio pro solutione*

3. Cf. U. NAVARRETE, "Privilegio de la fe...," cit., p. 302 and the bibliography on pp. 239–240; Idem, "De termino 'privilegium petrinum' non adhibendo," in *Periodica* (1964), pp. 323 ff. One can also consult, M. LÓPEZ ALARCÓN, "El privilegio petrino," in *Anales de la Universidad de Murcia-Derecho*, Course 1962–63, pp. 20 ff; I. HUY, *Dissolutio matrimonii e privilegio fidei iuxta canonem 1127* (Rome 1944); A. HOPFENBECK, *Privilegium petrinum* (St. Ottilien 1976); CIVISCA, *The dissolution of the marriage bond* (Naples 1967); J. TOMKO, "De dissolutione matrimonii in favorem fidei eiusque fundamento theologico," in *Periodica* (1975), pp. 99 ff; and, in general, the bibliographical references in J. FORNÉS, *Derecho matrimonial canónico*, cit., pp. 215–217 and in G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del 'privilegio paolino,'" in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 157 ff, especially pp. 175–177; A. SILVESTRELLI, *Scioglimento di matrimonio in favorem fidei*, ibid., pp. 179 ff, especially p. 216.

4. Cf. *Comm.* 10 (1978), p. 117; c. 1150 of the *Codex Iuris Canonici. Schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum* (Typis polyglottis Vaticanis 1982), pp. 203–204.

matrimonii in favorem fidei of December 6, 1973 and the accompanying procedural norms.[5]

The specific points that should be taken into account according to the regulations contained in c. 1148 include the following:

a) The canon contemplates only the phenomenon of an unbaptized person who simultaneously has more than one spouse. Therefore, it does not include a polygamous person who has more than one spouse successively.[6]

b) With respect to the clause related to the dismissal of the other spouses, it seems reasonable to believe that although the canon prohibits living with them *as a spouse*, it would be appropriate to continue having them in one's domicile, especially if they are elderly or sick, provided that there is no immediate danger of sin or scandal.[7]

c) Pursuant to the provisions of § 2, marriage must be celebrated according to the substantial juridical form regulated in cc. 1108, *et seq.* The provisions on mixed marriages (cc. 1124–1129) and other provisions of law (for example, those related to guarantees in connection with the impediment of disparity of cult) must be followed.[8]

d) The need to renew consent implied in "contracted in the legal form," as set forth in § 2, was the object of discussion and careful study in the preparatory work of the Code. Some consultors noted that it was neither necessary nor appropriate to demand renewal of consent once baptism was received, since consent is naturally considered sufficient with the very act of the decision to continue in marital cohabitation with one spouse, even if he or she was not the first. The consultors noted that the renewal of consent was not necessary; however, they did find that it was an appropriate act in order that there be certainty, through a formal act, regarding the choice of the unbaptized spouse.[9]

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5. Cf. *Documenta inde a Concilio Vaticano II expleto edita* (Vatican City 1985), pp. 65–71. Among others, J.L. ACEBAL, "El proceso de disolución del vínculo en favor de la fe," in *Ciencia tomista* 103 (1976), pp. 3 ff; P. FELICI, "Indissolubilità del matrimonio e potere di sciogliere il vincolo," in *Comm.* 7 (1975), pp. 173 ff; I. GORDON, "De processu ad obtinendam dissolutionem matrimonii in favorem fidei," in *Periodica* 79 (1990), pp. 511 ff; P. MONETA, "Lo scioglimento del matrimonio in favore della fede secondo la recente Istruzione della S. Sede," in *Il Diritto ecclesiastico* 87 (1976), II, pp. 228 ff; J. STEINDL, "Neuregelung der Eheaflösung in favorem fidei," in *Österreichisches Archiv für Kirchenrecht* 26 (1975), pp. 345 ff; A. SILVESTRELLI, *Scioglimento di matrimonio*..., cit., pp. 179 ff.

6. Cf. *Comm.* 10 (1978), p. 114.

7. Cf., e.g., G. GIROTTI, "La procedura...," cit., p. 171.

8. Cf. *Comm.* 10 (1978), pp. 115–116; CI, *Respuesta* 1, January 26, 1919 (it can be found in X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, I, n. 147 (Rome 1966), col. 176); SCSO, *Respuesta* June 30, 1937 (ibid., n. 1392, col. 1829).

9. Cf. *Comm.* 10 (1978), pp. 114–115; SCSO, *Respuesta* June 30, 1937 (it can be found in X. OCHOA, *Leges Ecclesiae*, cit., n. 1392, col. 1829).

e) The obligation provided in § 3 obviously derives from the demands of the very dignity of human beings. In the preparatory work on the Code, there was a suggestion that that this norm imposed an intolerable burden on the conscience of the ordinary. However, the consultors decided that this burden would only be intolerable if the ordinary had to assume it or resolve it. The norm therefore entrusted to the ordinary diligence or care so that the needs of any dismissed women would be met, which does not seem intolerable.[10]

10. Cf. *Comm.* 10 (1978), p. 115.

1149 **Non baptizatus qui, recepto in Ecclesia catholica baptismo, cum coniuge non baptizato ratione captivitatis vel persecutionis cohabitationem restaurare nequeat, aliud matrimonium contrahere potest, etiamsi altera pars baptismum interea receperit, firmo praescripto can. 1141.**

An unbaptized person who, having received baptism in the catholic Church, cannot re-establish cohabitation with his or her unbaptized spouse by reason of captivity or persecution, can contract another marriage, even if the other party has in the meantime received baptism, without prejudice to the provisions of Can. 1141.

SOURCES: c. 1125

CROSS REFERENCES: cc. 1055, 1056, 1061, 1085, 1086, 1108–1122, 1124–1129, 1134, 1141–1148, 1150

COMMENTARY

Juan Fornés

The last phenomenon of dissolution of marriage regulated in the Code is this one. It has its precedent in Gregory XIII's *Populis* of January 1, 1585, which was incorporated into c. 1125 of the *CIC*/1917 (see commentary on c. 1148).

Populis treated the marital problem of the separation between spouses due to the deportation of slaves: "As it often occurs that many of the unbelievers of both sexes, but especially males, coming from Angola, Ethiopia, Brazil, and other regions of the Indies, after having celebrated marriage through a gentile rite, captured by their enemies, are taken away from their country to very remote regions and are separated from their own spouses, such that they as well as those who remain captured in the homeland, and then convert to the faith, cannot ask the unbelieving spouses who are separated by so much distance if they wish to live with them, as they should, without offense to the Creator, either because at that time messages cannot even be sent to those hostile and savage nations, because they are totally unaware to which regions they were sent, or because the length of the trip creates a great difficulty: therefore, We, taking into account that said marriages celebrated between nonbelievers are certainly real, but not firm to the point that, being warranted by necessity, cannot be dissolved, and taking pity on the weakness of these peoples with the mercy of a father, with apostolic authority, and pursuant to this document, we grant each and every one of the Ordinaries and parish priests of said places and the priests of the Company of Jesus approved by their superiors to hear confessions and, at that time, sent to said regions

or admitted thereto, full authority to dispense to any faithful of either sex who, living in said regions, contracted marriage before receiving baptism and later converted to the faith, in order that either of them, with the unbelieving spouse living, and without asking for his or her consent or without waiting for an answer, may contract a marriage with any believer, even if he or she is from another rite, solemnize it before the Church and remain lawfully therein as long as they live, then consummating it through carnal copulation: provided that, albeit summarily and extra-judicially, there is evidence that the absent spouse, as has been stated, cannot be lawfully interpellated or, having been interpellated, has not expressed his or her will within the term established in said interpellation; we decree that these marriages should never be rescinded, but will always be valid and firm, and any children thereof will be legitimate, even if it is later determined that the first non-believing spouses could not state their will because of a just impediment and that they have also already converted when the second marriage was celebrated."

Unlike the constitutions of Paul III and Pius V, which referred directly to a right of baptized persons (see commentary on c. 1148), this document granted the authority to dispense to bishops, parish priests, and Jesuit confessors in the cases indicated in the text.[1] In other cases, a reply of the CPI from August 3, 1919 affirmatively resolved the question of whether, pursuant to c. 1125 *CIC*/1917, the authority to dispense referred to in *Populis* also referred to quasi-parish priests.[2]

In any event, what was stressed in the commentary on c. 1148 regarding the basis for this type of dissolution also applies in this case. It is an exceptional case of dissolution of marriage through a provision of law (*a lege*), based on the vicarious or ministerial power of the Roman Pontiff (see commentary on cc. 1143 and 1148).

A special characteristic that should be taken into account in c. 1149 is the possibility that the first marriage is ratified (sacramental). But the impossibility of a common life involves the absence of conjugal relations and, as a result, the fact that the marriage may not be consummated. Therefore, the dissolution takes place through the general concession (*a lege*), if the established requisites are met, through a special concession of the Roman Pontiff, pursuant to c. 1142.[3]

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1. Cf. U. NAVARRETE, "Privilegio de la fe: Constituciones pastorales del siglo XVI. Evolución posterior de la práctica de la Iglesia en la disolución del matrimonio de infieles," in *El vínculo matrimonial* (Madrid 1978), pp. 271ff.

2. Cf. X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae,* I, n. 147 (Rome 1966), n. 202, cols. 224–225.

3. Cf. *Comm.* 10 (1978), pp. 115–116. Cf., among others, G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del 'privilegio paolino,'" in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 173–174; A. SILVESTRELLI, *Scioglimento di matrimonio in favorem fidei*, ibid., pp. 181–182.

1150 **In re dubia privilegium fidei gaudet favore iuris.**

In a doubtful matter the privilege of the faith enjoys the favour of the law.

SOURCES: c. 1127; SCHO Resp., 10 iun. 1937

CROSS-REFERENCES: cc. 1055, 1056, 1060, 1061, 1085, 1086, 1134, 1141–1149, 1584

COMMENTARY

Juan Fornés

In a broad sense, the privilege of the faith can be considered as a principle informing the entire canonical system, one that justifies the basis of certain exceptions to the indissolubility of marriage, an essential property of *every* marriage, not only Christian marriage (cc. 1056 and 1085). Exceptions vary from the Pauline privilege (cc. 1143–1147), to those derived from polygamous situations (c. 1148), an inability to reestablish cohabitation (c. 1149), or non-codified cases of dissolution of non-sacramental marriage by express concession of the Roman Pontiff (contemplated in the SCDF Instruction *Instructio pro solutione matrimonii in favorem fidei* of December 6, 1973), which is accompanied by procedural norms.[1]

In this sense, under the provisions of c. 1150, protection of the faith takes priority over protection of the principle of indissolubility in certain situations. It is important to distinguish between intrinsic indissolubility and extrinsic indissolubility (see commentary on c. 1141). Intrinsic indissolubility refers to the fact that marriage cannot be dissolved through the will of the spouses; it is absolute. Extrinsic indissolubility means that there is no authority that can dissolve marriage; it is absolute in the case of ratified and consummated marriage (c. 1141) but, in other situations, there are some exceptions.

In this respect, the process of drafting the legal provision of the impediment of the bond (c. 1085) can serve as an example. The current provision is similar to c. 1069 of the *CIC*/1917, although the clause *salvo*

1. Cf. *Documenta inde a Concilio Vaticano II expleto edita* (Vatican City 1985), pp. 65–71. Cf. with the bibliographical references cited in the commentary on c. 1148.

privilegio fidei was omitted, after appearing in initial drafts.[2] It is true that, in the case of doubt, the *privilegium fidei* always enjoys the favor of law, as indicated in c. 1150; that is, the *favor fidei* prevails over the *favor matrimonii* (c. 1060). From this point of view, this clause could be redundant; however, it does not come from the perspective appearing in the preparatory work of the Code, according to which the omission is owing to the fact that "in the case of the privilege of the faith, the preceding marriage is dissolved by dispensation of the Supreme Pontiff."[3] Although some consultors favored this approach, others were opposed because "in the case of the privilege of the faith, the preceding marriage is not dissolved except by the subsequent marriage,"[4] and it seems that the latter position is more consistent with the other juridical regulations on marriage. It is sufficient to state that c. 1143 § 1 expressly prevents dissolution by the Pauline privilege *in favorem fidei* from occurring when the new marriage is contracted (see commentary on cc. 1143–1147).

Therefore, in a strict sense, c. 1150 refers to the only exception to the principle *favor iuris* enjoyed by marriage pursuant to c. 1060, according to which, in a doubtful matter, one must hold the validity of the marriage unless proven otherwise.[5] In this regard, it is significant that the drafting of c. 1150 did not give rise to any objection in the preparatory work on the Code: "De hoc canone factae non sunt animadversions."[6]

However, the privilege of the faith prevails over the principle of *favor iuris,* such that, in the case of doubt regarding the validity of a marriage contracted by two unbaptized persons, if one of them converts and is baptized, it is presumed that the marriage is invalid, so that the convert may enter marriage with a Christian. The exception has little relevance, as has been stressed in doctrine,[7] if it is taken into account that, even if a marriage contracted by two unbaptized persons is valid, the second marriage would be possible through the Pauline privilege or dissolution *a lege* based on the vicarious or ministerial power of the Roman Pontiff, or through the express concession of the Roman Pontiff. It is important to bear in mind that, in the case under consideration, the issue is not a dissolution of marriage, but a presumption of the invalidity of a marriage contracted by two unbaptized persons, when its validity is in question, through the application of the *favor fidei.* If this principle is the basis

2. Cf. *Comm.* 9 (1977), p. 362. Regarding this point, consult J. FORNÉS, "Los impedimentos matrimoniales en el nuevo Código de Derecho canónico," in *Estudios de Derecho canónico y de Derecho Eclesiástico en homenaje al Prof. Maldonado* (Madrid 1983), pp. 99ff; idem, *Derecho matrimonial canónico* (Madrid 1990), pp. 66–69.
3. Cf. *Comm.* 9 (1977), p. 362.
4. Cf. ibid.
5. Regarding the principle of the *favor iuris,* one can consult, J. FORNÉS, *Derecho matrimonial canónico,* cit., pp. 43–48, with the bibliographical references on the issue.
6. *Comm.* 10 (1978), p. 116.
7. Cf. J. HERVADA, commentary on c. 1150, in *CIC Pamplona.*

supporting a possible dissolution, it would also support a presumption *iuris tantum* of nullity.

Therefore, the dissolution of marriage, which is regulated in the preceding canons, is an exception to the general principle of indissolubility.[8] It would not be consistent to maintain that dissolubility is the rule and indissolubility is the exception. As one author notes, "The rules of law, in order to be real and shine more as principles, need the shadow of the exceptions. When from an illusory idealism we seek to establish rules without exceptions, the rule itself disappears; the normality that is the object of the provision becomes a vague physical normality of social behavior; law is dissolved in Sociology."[9]

8. One can consult, J. FORNÉS, "La indisolubilidad del matrimonio," in *Ius Canonicum*, 35–36 (1978), pp. 443ff, especially, pp. 469–470.

9. A. D'ORS, "La pérdida del concepto de excepción a la ley," in idem, *Escritos varios sobre el Derecho in crisis* (Rome-Madrid 1973), p. 159.

ART. 2
De separatione manente vinculo

ART. 2
Separation While the Bond Remains

1151 **Coniuges habent officium et ius servandi convictum coniugalem, nisi legitima causa eos excuset.**

Spouses have the obligation and the right to maintain their common conjugal life, unless a lawful reason excuses them.

SOURCES: c. 1128

CROSS-REFERENCES: cc. 1152–1155, 1673, 1692–1696, 1727–1739

COMMENTARY

Javier Escrivá Ivars

1. *Nullity, dissolution, and separation*

Common conjugal life, marriage in facto esse, consists of the bond, the conjugal rights and obligations that flow from the bond, and the common life in which these rights and obligations are exercised. These three elements receive different canonical treatment, namely nullity, dissolution, and separation.

Dissolution of marriage and separation both take place in virtue of causes that occur following the celebration of marriage. However, dissolution involves extinction of the bond, the rights and obligations flowing from that bond, and common life. In contrast, separation only suspends the rights and obligations that flow from the bond and correlatively interrupts cohabitation.

Nullity differs from dissolution and separation since it occurs due to causes that are contemporaneous with the celebration of marriage. It involves the nonexistence of the bond from the start, as well as the extinction of the rights and obligations between the spouses, precisely because their cause is lacking.

While dissolution and nullity affect the three elements of marriage *in facto esse*, thus causing its fundamental extinction, separation of bodies only suspends conjugal rights and obligations, except in some aspects, while the bond remains. In cases of separation, then, the rights that make up marriage (*ius in corpus, ius cohabitandi*) remain in force, even if they are not realized.[1]

The Catholic Church has always considered conjugal separation an extreme remedy for difficulties arising from matrimonial life.[2] If matrimony is a freely constituted, indivisible, exclusive, and perpetual community of love, the separation of spouses is an anomalous and undesirable situation. Therefore, the legislator gives separation a markedly pastoral treatment juridically,[3] exhorting spouses to forgive the behaviors that create the separation and, if possible, restore conjugal cohabitation. He avoids consideration of separation as a penalty against a spouse guilty of adultery or harming conjugal cohabitation, instead treating separation as an institution for the prevention of future evils for the innocent spouse and children.

It could not be otherwise, because the concept of separation starts from the basis of a valid marriage. Since separation is a mere suspension of the effects of a normally constituted bond and not its extinction, it carries in its very essence a natural tendency to rebuild the suspended rights and obligations and restore common life.

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1. Cf. A. DE LA HERA, *Relevancia jurídico-canónica de la cohabitación conyugal* (Pamplona 1966).

2. Cf., the entries "Separación matrimonial, Separaciones matrimoniales forzosas, Separados, Pastoral familiar, Abandono del cónyuge," etc., in A. SARMIENTO-J. ESCRIVÁ, *Enchiridion Familiae*, 6 vols. (Madrid 1992).

3. Regarding the pastoral activity of the Church in marriage cases, especially in those of separation, cf. C. DE DIEGO-LORA, "Medidas pastorales previas en las causas de separación conyugal," in *Ius Canonicum* 49 (1985), pp. 209–225; idem, "Las causas de separación de cónyuges según el nuevo Código," in *Dilexit Iustitiam. Studia in honore Aurelii Card. Sabattini*, curantibus Z. Grocholewski et V. Cárcel Ortí, (Vatican City 1984), pp. 391ff; idem, "Función pastoral y separación de cónyuges," in *Ius Canonicum* 13 (1973), pp. 259–284; D. STAFFA, "De natura pastorali administrationis iustitiae in Ecclesia," in *Periodica* 61 (1972), pp. 3–19; J. GIMÉNEZ Y MARTÍNEZ CARVAJAL, "Orientación pastoral del nuevo Código de Derecho Canónico," in *Estudios Eclesiásticos* 58 (1983), p. 380ff. Regarding the pastoral work of the judges, see PAUL VI, *Discurso dirigido al Tribunal de la Sagrada Rota Romana*, March 8, 1973; JOHN PAUL II, *Discurso dirigido al Tribunal de la Sagrada Rota Romana*, January 28, 1978; idem, *Discurso dirigido al Tribunal de la Sagrada Rota Romana*, February 4, 1980; idem, *Discurso dirigido al Tribunal de la Sagrada Rota Romana*, February 26, 1984, in A. SARMIENTO-J. ESCRIVÁ, *Enchiridion Familiae*, cit.

2. *Right-duty to commonality of life*

Matrimony is naturally provided for married life. The valid celebration of matrimony entails the duty (at least intersubjectively[4]) to establish and develop married life, because married life is the object of the mutual rights and obligations of the spouses. Canon 1151 sanctions this by stating "Spouses have the obligation and the right to maintain their common conjugal life." The right-duty of common life is the external manifestation of common conjugal life and constitutes the environment for the receiving and education of children. Nevertheless, c. 1151 authorizes spouses to suspend cohabitation if "a lawful reason excuses them."

The right-duty of physical cohabitation stated in c. 1151 should not be confused with the right to common conjugal life. The right to common conjugal life is the juridical situation of solidarity and of shared assets, social condition, etc., between the spouses. The right-duty to cohabitation adds to the common conjugal life the specific fact of common life, since cohabitation is a natural consequence of the *ius in corpus* and common conjugal life. In this sense, cohabitation is the immediate operative principle for satisfactory fulfillment or exercise of the right-duty to the conjugal act and to common conjugal life. The right-duty to establish and maintain marital cohabitation is not the right-duty to common conjugal life, but a consequence of it. Undoubtedly, conjugal common life can exist with a very limited matrimonial life, as in the case of immigrants, exiled persons, incarcerated persons, and persons hospitalized due to serious mental illness. These situations are not the norm in marriage, but they graphically show that matrimony, common conjugal life as a juridical status, and married life cannot be confused.

The duty and the right to establish and maintain conjugal cohabitation are subject to the vicissitudes of real life. However, as indicated in c. 1151, any separation must be owing to a lawful cause. Thus, matrimony always implies a relationship of cohabitation, but not necessarily a situation of cohabitation.

Once matrimony takes place, a complex combination of interwoven interests is established between the spouses (individual, family, social, economic, spiritual, emotional, religious, etc.), and these interests develop, coincide, and unfold from the immediate cohabitation of the spouses. According to Hervada, [5] this living together is informed by a series of informing principles that constitute the general guidelines for spousal behavior. These principles are different from the conjugal rights and obligations, to which they give direction and meaning.

4. the difference between institutional and intersubjective duties, cf. J. HERVADA, "Obligaciones esenciales del matrimonio," in *Ius Canonicum* 31 (1991), pp. 63ff.

5. Cf. J. HERVADA, commentary on c. 1151, in *CIC Pamplona.*

There are five of these informing principles:

1) Spouses must guard their fidelity. Conjugal fidelity is not only the fruit of a conjugal right-duty, but includes the demand to be "one flesh."

2) Spouses must tend to their mutual material or corporal perfection. This rule implies that spouses must help each other in the maintenance and improvement of the material aspects of their personal life. It also refers to the fact that matrimonial life must not involve a detriment to the corporal or material good of the other spouse.

3) Spouses must tend to their mutual spiritual perfection. This implies that spouses must help each other in the maintenance and improvement of their emotional, moral and religious life. One spouse must not cause the other any detriment to his or her spiritual well being.

4) Spouses must live together. This is the duty of physical cohabitation, namely a shared table, bed, and dwelling.

5) Spouses must tend to the material and spiritual good of their children. This rule implies that spouses must tend to favor their dual well being in connection with their offspring. Moreover, one must not cause any harm to their material or spiritual well being, immorally or culpably.

3. *The personal right to conjugal separation and its foundation*

Conjugal separation is a personal right of the spouses, the purpose of which is suspension of the conjugal rights and obligations with the bond remaining.

Canon 1151, after indicating that the spouses have the duty and the right to maintain conjugal cohabitation, presents an exception: "unless a lawful reason excuses them." What are lawful causes for separation? They are the behaviors that harm ordered compliance with the personal benefits of the spouses. As indicated by Hervada,[6] they are behaviors violating the principles informing matrimonial life.

From the conjugal bond and the relationship of matrimonial life arise rights and obligations that constitute the content of the matrimonial juridical relationship. These personal benefits cannot be waived and are mutual, permanent, and exclusive. They are inseparably united and naturally designed for achieving the objectives characteristic of matrimony. The concrete exercise of these benefits involves conduct specified by the personal dignity of the spouses and the nature and objectives of the marriage.

6. Cf. ibid.

Marriage is a union with meaning and objectives. Conjugal life takes part inside this meaning and these objectives, because it constitutes the development of the marriage on the plane of action. Therefore, conjugal life is naturally designed to achieve goals characteristic of marriage. In this way, these objectives act as the regulating principle of the action of the spouses in the concrete development of married life.

The objectives of marriage involve conjugal rights and obligations, and compliance with these rights and obligations involves given behaviors by the spouses, which is proper, inasmuch as conjugal relationships are relationships of justice, not mere moral obligations. Thus, that behavior, governed by the good of the spouses and the creation and education of children, is regulated by the principles informing married life.

Any conduct that gravely harms the principles informing married life constitutes the situation that serves as a basis for the right to conjugal separation, inasmuch as it involves non-compliance or irregular compliance with conjugal rights-duties.

The basis of the right to separation is the existence of behavior by the other spouse that is seriously detrimental to the principles informing matrimonial life. To be specific, the causes of separation are adultery, malicious abandonment, and behavior that puts the other spouse or the children in grave spiritual danger, grave bodily danger, or that in any other way makes common life too difficult. For a more detailed discussion of these causes, see the commentary on cc. 1152–1153.[7]

4. *Titulus of the law of conjugal separation*

For conjugal separation to have juridical efficacy, it is not enough that there be a lawful cause as regulated by cc. 1151 to 1155. Only under certain circumstances may the innocent spouse separate on his or her own authority (cc. 1152 § 3 and 1153 § 1). Generally, intervention by an ecclesiastical authority is necessary, either by decree of the ordinary (administrative separation) or by judgment of a competent judge (judicial separation). The legislator requires intervention by the ecclesiastical authority to objectively assess and determine the causes, the duration, and the effects of the separation. Therefore, in the case of adultery, within six months of having spontaneously terminated common conjugal life, the innocent spouse must bring a case for separation to the competent ecclesiastical authority (c. 1152 § 3). In other cases, one may only bring a case "if there is danger in delay" (c. 1153 § 1), which gives this decision a provisional nature that

7. On the causes of separation, cf. A. BERNÁRDEZ CANTÓN, *Las causas canónicas de separación conyugal* (Madrid 1961).

requires intervention by the ordinary. Therefore, to satisfy the title of the right to separation, there is a dual method: administrative and judicial.

Nevertheless, it is necessary to make an important distinction between *de facto* separation and *de jure* separation.

a) *Separation of fact*

De facto separation indicates the cessation of matrimonial cohabitation, established arbitrarily by the spouses, either with the consent of both parties or unilaterally. This separation does not modify the juridical relationship between the spouses; it only involves a change in cohabitation. It is in fact a real separation, in which the juridical relationship remains intact but not complied with.

The following phenomena should not be confused:

— Separation of fact by mutual accord, that is, separation imposed by unintended circumstances or by material or spiritual convenience of the spouses (legitimate business, supernatural causes, etc.). This type of separation is juridically irrelevant and morally lawful.

— Separation of fact unilaterally imposed by one spouse for a just reason is juridically irrelevant and morally lawful, although it is possible to question its absolute juridical inefficacy, given that canon law recognizes the possibility of unilateral separation for adultery (c. 1152 § 3) or if a delay in authorization from the ordinary involves danger (c. 1153 § 1).

— Separation of fact for an indefinite period, by mutual consent or imposed unilaterally by one of the spouses, without a truly grave justifying cause, which is juridically ineffective and morally unlawful. If applicable, the legal definition of malicious abandonment could constitute separation unilaterally imposed by one of the spouses without just cause.

b) *Separation of law*

Separation of law involves the temporary or permanent suspension of the conjugal rights-duties by the competent authority after verification of the existence of a lawful cause for separation. There are two channels for satisfying the sufficient title of the right to conjugal separation: the existence of one of the lawful causes defined by the legislator and the intervention of the competent ecclesiastical authority.

The procedure related to causes of separation is regulated in cc. 1692–1696. Barring anything lawfully provided by particular law, personal separation of baptized spouses can be decided by decree of the diocesan bishop (administrative channel) or by judgment by a judge (judicial channel). The administrative channel is pursued before the diocesan bishop, who will pronounce his decision by decree, in which he must decide whether the separation requested is according to law, and he must find regarding the education and support of the children (cf. c. 1154). This decree may be appealed, pursuant to cc. 1732–1739. The judicial channel

must be pursued before the competent judge or tribunal, pursuant to the provisions of c. 1673, referred to in c. 1694, who will hear the cause according to the procedure of an oral or ordinary contentious process (cf. 1693 § 1).

In some cases, the legislator subjects the *actio separationis* of spouses, authorized in cc. 1152 and 1153, to very brief periods of expiration and to express and even implied condonations. If, in the event of a delay, there is a well-founded fear of some danger, the separation may even be exercised unilaterally by the innocent spouse on his or her own authority. Since the bond remains intact, the subjective rights giving rise to the separation action belong to the private sphere of determination of the spouse who suffered the offense, who may be forgiven by the former even if he or she continues to suffer the harm or prejudice involved in cohabitation.

1152 **§ 1. Licet enixe commendetur ut coniux, caritate christiana motus et boni familiae sollicitus, veniam non abnuat comparti adulterae atque vitam coniugalem non disrumpat, si tamen eiusdem culpam expresse aut tacite non condonaverit, ius ipsi est solvendi coniugalem convictum, nisi in adulterium consenserit aut eidem causam dederit aut ipse quoque adulterium commiserit.**

§ 2. Tacita condonatio habetur si coniux innocens, postquam de adulterio certior factus est, sponte cum altero coniuge maritali affectu conversatus fuerit; praesumitur vero, si per sex menses coniugalem convictum servaverit, neque recursum apud auctoritatem ecclesiasticam vel civilem fecerit.

§ 3. Si coniux innocens sponte convictum coniugalem solverit, intra sex menses causam separationis deferat ad competentem auctoritatem ecclesiasticam, quae, omnibus inspectis adiunctis, perpendat si coniux innocens adduci possit ad culpam condonandam et ad separationem in perpetuum non protrahendam.

§ 1. It is earnestly recommended that a spouse, motivated by Christian charity and solicitous for the good of the family, should not refuse to pardon an adulterous partner and should not sunder the conjugal life. Nevertheless, if that spouse has not either expressly or tacitly condoned the other's fault, he or she has the right to sever the common conjugal life, provided he or she has not consented to the adultery, nor been the cause of it, nor also committed adultery.

§ 2. Tacit condonation occurs if the innocent spouse, after becoming aware of the adultery, has willingly engaged in a marital relationship with the other spouse; it is presumed, however, if the innocent spouse has maintained the common conjugal life for six months, and has not had recourse to ecclesiastical or to civil authority.

§ 3. Within six months of having spontaneously terminated the common conjugal life, the innocent spouse is to bring a case for separation to the competent ecclesiastical authority. Having examined all the circumstances, this authority is to consider whether the innocent spouse can be brought to condone the fault and not prolong the separation permanently.

SOURCES: § 1: c. 1129 § 1
§ 2: c. 1129 § 2
§ 3: c. 1130

CROSS REFERENCES: —

COMMENTARY

Javier Escrivá Ivars

Like cc. 1129–1130 of the *CIC*/1917, c. 1152 mentions the only cause in canon law that can give rise to perpetual separation: adultery by one of the spouses.[1] According to the common opinion of writers, the admissibility of adultery as a cause for perpetual separation is based on the *regula iuris frangenti fidem, fides non est servanda,* a logical consequence of the general legal principle, *fides est servanda.* Therefore, c. 1152 sets forth negatively the first basic principle governing marriage: *foedus nuptiale servandum est.*

1. *Concept of adultery*

Adultery is sexual intercourse between a validly married person and a person who is not his or her spouse. It does not matter if a man or a woman commits it, or whether the accomplice is married or single. Adultery as a cause for separation only takes place when a man and a woman join to each other—when at least one of them is validly married—in such as way as to become "one flesh," and they are not husband and wife. Adultery involves the violation of the unity by means of which spouses can unite so closely that they come to be "one flesh," and, in this sense, it is the antithesis of the marital relationship, the antimony of marriage.

As a benefit of marriage, fidelity can only be realized properly in the conjugal relationship of a man with a woman. The demand of this relationship is a characteristic of marital love, the interpersonal structure of which is governed by the interior norms of the "community of persons." Adultery constitutes the break-up of this conjugal alliance of the man and the woman. Moreover, the alliance between a man and a woman constitutes the foundation of the union by which "a man ... cleaves to his wife, and they become one flesh" (Gen. 2, 24). This bodily unity is a right (*ius in corpus*), but it also is the external sign of the communion of persons, the unity established between the man and the woman as spouses. Thus, adultery committed by one of them is not only a violation of the *ius in corpus*, which is exclusive to the other spouse, but at the same time is a fundamental adulteration of that sign.

1. Regarding adultery as a cause for separation see A. BERNÁRDEZ CANTÓN, *Las causas canónicas de separación conyugal* (Madrid 1961); idem, *Compendio de Derecho Matrimonial Canónico*, 7th ed. (Madrid 1991), pp. 264ff; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho Matrimonial Canónico y Concordado*, 5th ed. (Madrid 1994), pp. 285ff.

By penalizing adultery, the legislator is directly protecting the very status of the defrauded spouse in his or her faith, inasmuch as adultery violates the most unique obligation of marriage, fidelity related to the specifically conjugal acts. It is protecting not so much the personal dignity of the innocent spouse, as much as the specific marital dignity of the innocent spouse; it is protecting the spouse precisely because s/he is a spouse. Adultery extinguishes first the obligation of conjugal sexual intercourse and consequently the obligation of cohabitation.

The other causes of separation are established to the extent that they represent a threat to the spouse as a person and directly affect the obligation of cohabitation, involving the potential danger that that cohabitation could pose to the body or soul of the spouses.

The spouses must keep faithful to each other. The duty of fidelity involves the exclusivity linked to the conjugal act and the demand to be "one *caro*," namely a unity in the masculine and feminine natures of the spouses. Adultery always involves an injustice, a lack of due faith and an adulteration of the communion of persons in which the spouses have evolved by virtue of a valid conjugal pact.

A mere carnal union, even occurring just once, is sufficient for adultery, without a system of stability or frequency in relations with the same person (concubinage) being necessary.

2. *Requirements for the canonical classification of adultery*

For extramarital sexual relations to be defined as adultery and, therefore, for separation to be lawful, the adultery must be formal, consummated, and morally certain.

a) *Formal or culpable*

Since the conjugal act is the typical way in which spouses express themselves as "one flesh," Hervada states that adultery involves a direct threat to the innocent spouse, equivalent to refusing him or her as a spouse. Because it is a case of injustice, for it to constitute a true offense, the adultery must be formal, that is, it must be committed with knowledge that it is an infidelity, and it must be a free will decision. Therefore, material adultery is not enough.

Since adultery is sexual intercourse between a validly married person and a person who is not his or her spouse, for adultery to be formal, the spouse must know that the person with whom he or she is having intercourse is not his or her spouse. Therefore, if a spouse had sexual intercourse with a person he or she believed to be his or her lawful spouse, there would be no case for adultery. There would also not be adultery if the validly married person thought him or herself free of the conjugal

bond due to the supposed death of the other spouse, and therefore believed that the sexual act was merely fornication.

Moreover, there is no adultery if a married person is sexually assaulted by physical force. It has been argued whether, in cases of rape, the adultery could be considered formal if the spouse did not fight the assault due to grave fear. Because formal adultery is a product of a free will decision, then if the fear is grave, for juridic purposes it would be material, but not formal, adultery.

b) *Perfect or consummated*

Adultery must be consummated, in the sense that sexual intercourse must take place with a third person. Other sexual acts are insufficient, but they may serve as proof of adultery or constitute a cause for temporary separation. Doctrine usually places sodomy with a third person and bestiality on the same level with adultery because they violate the sexual fidelity of the innocent spouse.

c) *Morally certain*

For adultery to have juridical consequences, it must be proven with moral certainty. No one can be deprived of his or her right if it is not proven with moral certainty that s/he violated his or her obligations. Thus, this is a procedural requirement, as opposed to the other requirements, which are objective or substantive.

For a judicial judgment, it is necessary to prove that adultery was committed. However, since adultery takes place in privacy, proof is very difficult, and circumstantial evidence is highly important. The judge can achieve moral certitude through indications, conjecture, and especially conclusive presumptions (e.g., if the spouse is discovered sleeping with a third person in the same bed). Jurisprudence and canonical doctrine agree that the presumptions must be suitable for creating moral certainty. Mere probability, regardless of how high, is insufficient.

3. *Extenuating causes of the law in permanent separation for adultery*

There can be certain circumstances that impede the exercise of the right of the innocent spouse to separation. These circumstances include (c. 1152 §§ 1–3): *a)* when the innocent spouse has consented to the adultery; *b)* when the innocent spouse has been the cause thereof; *c)* when the innocent spouse has also committed adultery; and *d)* when the innocent spouse has expressly or tacitly forgiven the adulterer. In these circumstances, there would be no cause for separation because the force of the basic principle thereof, *frangenti fidem, fides non est servanda,* would cease to exist.

In the cases of *consent* and *provocation*, the personal injustice that adultery constitutes ceases to exist, since there is mutual consent between the spouses. In the event that the innocent spouse also commits adultery (*compensation*), the personal injustice also disappears, because there is a correlation in violating the conjugal fidelity on the part of both spouses. Lastly, the right to separation is extinguished when the innocent spouse forgives the guilty party, expressly or tacitly (*condoning*).

a) *Assent to adultery* (c. 1152 § 1)

Assent to adultery is express or tacit consent to the act that the spouse is going to commit. There is tacit consent when, from the way the spouse acts, it can be deduced that he or she is consenting to the other's adultery. For example, this would be the case when the innocent spouse learns either of the other spouse's plans to commit adultery or that the other spouse is maintaining sexual relations with a third party, but either does nothing to prevent them or provides the means for them to continue.

With both express and tacit consent, the subjective reasons for the assent or approval are juridically irrelevant. For express or tacit consent to prevent the exercise of the innocent party's right to separation, it must not suffer from any of the defects affecting the efficacy of a juridical act. In the event that the consent should be nullified by any of the circumstances affecting the efficacy of juridical acts, it can not be considered consented adultery.

The consent given by the innocent spouse obviously refers to future adultery, and it can always be revoked. Consequently, from the time the innocent spouse revokes his or her consent and makes that known to the other spouse, expressly or tacitly, any adultery committed thereafter by the latter would be imputable for the purposes of separation.

b) *Provocation of adultery* (c. 1152 § 1)

Provocation of adultery is more serious than consent. There is provocation when a spouse positively incites, assists, or induces the other to commit adultery or if there has been coercion to commit adultery. To consider provocation as a cause of adultery, it must be direct and immediate; there must be a causal relationship between one spouse's action and the other spouse's adultery.

Bernárdez[2] indicates that provocation can take place *expressly*, through an order, advice, or insinuation, or *tacitly*, by placing the spouse in certain environments and allowing or facilitating certain companionship. Provocation also can take place by repeated denial of the conjugal sexual obligation, food, expulsion from the home, etc.

2. Cf. A. Bernárdez Cantón, *Compendio...*, cit., p. 266.

c) *Compensation of adulterers* (c. 1152 § 1)

There is compensation when both spouses have committed adultery, regardless of who committed it first or more times. Taking into account that compensation involves the neutralization of guilt due to its casuistry, it causes some problems:

— *In relation to consented adultery.* Consented adultery prevents compensation. The spouse who consented to his or her spouse's adultery, then committed adultery, is guilty for consenting to the other's adultery and for his or her own adultery.

— *In relation to provoked adultery.* Provoked adultery prevents compensation. The spouse who provoked, then committed adultery, is guilty: for provoking the other's adultery and for his or her own adultery. In this case, as in the case of consented adultery, the spouse who both committed adultery and consented or induced his or her spouse to do the same cannot benefit from compensation.

— *In relation to condoned adultery.* This issue is based on whether the adulterer who obtained forgiveness can ask for separation due to the adultery of the spouse by whom he or she has been forgiven. A sector of doctrine has stated that forgiven adultery cannot be invoked as compensation by the forgiver, if the latter in turn commits adultery after the condoning. Consequently, the forgiven spouse could request and obtain separation due to the spouse's adultery.

Nevertheless, Bernárdez claims that it is possible to maintain—invoking the tendency of canon law to favor the normal life of the institution of marriage—that if the innocent party who condoned the adulterer should later commit the same offense, compensation of adultery could be held.[3]

— *In relation to adultery committed by the innocent spouse after having obtained sentence of separation for adultery.* In this situation, there is compensation of adulteries, because a judgment in favor of separation for adultery does not authorize one to commit adultery. The first guilty spouse may request reinstatement of conjugal common life, especially if the separation took place on the authority of the offended spouse. If the separation took place through a judicial judgment, even if it could be morally understood that there was compensation for the adultery in the external forum, a new judicial judgment amending the current juridical status can be expected.

d) *The condoning of adultery* (c. 1152 §§ 2 and 3)

Forgiveness granted by the offended spouse to the adulterous spouse absolutely prevents the perpetual separation of the spouses due to adultery. Although the offended spouse has no obligation to forgive the

3. Cf. idem, "La compensación de adulterios en las causas canónicas de separación matrimonial," in *Revista Jurídica de Cataluña* (1961), pp. 337–361.

adultery, the pastoral tone with which the legislator begins c. 1152 encourages the offended spouse to grant forgiveness, moved by Christian charity and taking into account the good of the family.

Forgiveness must be spontaneous and involve knowledge of the adultery on the part of the condoning party. This condoning can take place expressly, tacitly, or assumably (c. 1152 §§ 2 and 3).

There is *express* forgiveness when the offended party manifests it through words or equivalent signs. For adultery to be *tacitly* forgiven, it is necessary that the innocent party knows of the spouse's adultery, continues cohabitation without coercion, and resumes marital relations, not mere cohabitation. Condoning *is presumed* if, for six months after the innocent party learns of his or her spouse's adultery, the innocent party continues in conjugal cohabitation without having resorted to the ecclesiastical or civil authority. The presumption allows evidence to the contrary.

4. *Form of establishing permanent separation* (c. 1152 § 3)

Conjugal separation cannot take place without the intervention of the public authority. In marriage between baptized persons, this intervention by proper right belongs to the competent ecclesiastical authority. However, "Where the ecclesiastical decision does not produce civil effects—according to c. 1692 § 2—or if it is foreseen that there will be a civil judgement not contrary to the divine law, the Bishop of the diocese in which the spouses are living can, in the light of their particular circumstances, give them permission to approach the civil courts" (see commentary on c. 1692).

However, because the intervention of the public authority is necessary in the perpetual separation procedure, this separation can take place on an innocent spouse's own authority. If the innocent spouse suspends conjugal cohabitation of his or her own will, he or she must lodge a cause for separation before the competent ecclesiastical authority within six months.

1153 **§ 1. Si alteruter coniugum grave seu animi seu corporis periculum alteri aut proli facessat, vel aliter vitam communem nimis duram reddat, alteri legitimam praebet causam discedendi, decreto Ordinarii loci et, si periculum sit in mora, etiam propria auctoritate.**

§ 2. In omnibus casibus, causa separationis cessante, coniugalis convictus restaurandus est, nisi ab auctoritate ecclesiastica aliter statuatur.

§ 1. A spouse who occasions grave danger of soul or body to the other or to the children, or otherwise makes the common life unduly difficult, provides the other spouse with a lawful reason to leave, either by a decree of the local Ordinary or, if there is danger in delay, even on his or her own authority.

§ 2. In all cases, when the reason for separation ceases, the common conjugal life is to be restored, unless otherwise provided by ecclesiastical authority.

SOURCES: § 1: c. 1131 § 1; CodCom Resp. III, 25 iun. 1932 (*AAS* 24 [1932] 284)
§ 2: c. 1131 § 2

CROSS-REFERENCES: c. 1152

COMMENTARY

Javier Escrivá Ivars

Canon 1153 contains the causes for temporary separation,[1] separation that lasts as long as its cause. Instead of detailing these causes, as in c. 1131 of the *CIC*/1917, c. 1153 establishes three generic types: *grave spiritual danger*, *grave bodily danger*, and *grave difficulty in common life*.

1. *Grave spiritual danger* (c. 1153 § 1)

Canonical doctrine has tended to interpret this cause for separation as protection of the religious life of a person when either his or her salvation or the peaceful practice of his or her faith could be in danger. In short,

1. On the causes of conjugal separation, see A. BERNÁRDEZ CANTÓN, *Las causas canónicas de separación conyugal* (Madrid 1961).

it has come to be identified with inducement to sin. This interpretation was supported in c. 1131 of the *CIC*/1917 by the words *grave seu animae*, which were interpreted in a theological sense. Although the expressions *grave seu animae* (c. 1131 of the *CIC*/1917) and *grave seu animi* (c. 1153 § 1) can be understood in various senses, this cause for separation has come to be identified with protection of the Catholic faith of the spouse and children. This may be because other values are safeguarded by the causes for separation that protect the temporal good of the person or peaceful cohabitation, as indicated by Bernárdez.[2]

There is grave spiritual danger when a spouse expressly or tacitly, positively and repeatedly incites his or her spouse or children to commit grave sins, or prevents them from meeting their religious obligations.

2. *Grave bodily danger* (c. 1153 § 1)

There is bodily danger when, for any reason, there is danger to the personal safety or health of the spouses or children as a result of cohabitation. Through this cause for separation, the legislator protects the lawful right every person has to do what is necessary to preserve his or her own life and personal safety, and that of his or her children, especially if they are minors and cannot act on their own behalf.

These threats or dangers may come from the malice of the other spouse, as well as from causes for which neither spouse is directly responsible. It will result from a spouse's malice when, for example, he or she attacks the other spouse or their children, threatens them with death or grave bodily harm, or when it is seriously and justifiably foreseen that this can occur at any time, without prior threats. It will proceed from causes without fault on the part of either spouse when one spouse suffers from a serious contagious illness or a state of insanity, and there is no other way of avoiding the danger. Consequently, if one spouse places the other or the children in grave bodily danger, he or she is providing a lawful reason to separate, whether or not the danger can be morally imputed to him or her.

Grave bodily danger is a concept where the irrelevance of the spouse's fault can acquire greater importance. Certainly the danger can be enough without fault for there to not be a duty to live together. Moreover, not living together can even be a duty, as with serious contagious illnesses, aggressive insanity, etc. In these latter cases, the judge must investigate the seriousness of the illness or the danger of the mentally ill person to proceed with maximum justice, defending the personal safety of the spouse and children but also protecting the principle of mutual assistance

2. Cf. A. BERNÁRDEZ CANTÓN, *Compendio de Derecho Matrimonial Canónico*, 7th ed. (Madrid 1991), p. 269.

that governs the institution of marriage. For lawful separation, the situation that is contrary to conjugal life must be a fault or irremediable through other means.

3. *Grave danger in common conjugal life* (c. 1153 § 1)

According to c. 1153 § 1, there is a legitimate cause for separation when a spouse makes common life too difficult. *Making the common life unduly difficult* is a generic expression that indicates a series of varied circumstances that can make conjugal cohabitation very difficult or impossible. With this expression, the legislator makes way for all those manifestations of cruelty—verbal or physical abuse, harshness, and lack of consideration towards another—that produce a common life that is practically impossible.

Physical cruelty includes violent conduct and physical aggression against one's spouse or one's material assets, cruel or merciless treatment through beating, etc. *Moral cruelty* involves offensive conduct, in word, act, or omission, against the dignity, honor, and feelings of the person, through slander, insults, disregard. For separation due to physical or moral cruelty to be lawful, the following conditions are necessary:

— it must be *grave,* such that it makes common life dangerous for the spouse or children;

— it must be *repeated,* because if it were merely occasional, it would not create the fear for future common life, which justifies the separation;

— and separation must constitute *the only means* of avoiding the danger involved in common life.

4. *Malicious abandonment*

The concept of malicious abandonment as a sufficient cause for separation is not expressly provided by current legislation. Its autonomous treatment and character regarding the other concepts of separation is the result of a work of jurisprudence and doctrine with the intent of specifically protecting compliance with every conjugal and family duty, and penalizing their omission.[3]

3. Cf. J. HERVADA, "Observaciones sobre el abandono malicioso y la restauración de la vida conyugal," in idem, *Vetera et Nova* (Pamplona 1991), pp. 69–119; A. FERNÁNDEZ CORONADO, *El abandono malicioso. Estudio jurisprudencial* (Madrid 1985); A. BERNÁRDEZ CANTÓN, "El abandono malicioso como causa de separación conyugal," in *Revista Jurídica de Cataluña* 59 (1960), pp. 167–203.

Malicious abandonment is differentiated from other causes of separation in that, while causes expressly defined in the *CIC* contemplate positive conduct—"occasions grave danger of soul or body to the other or to the children, or otherwise makes the common life unduly difficult"—malicious abandonment contemplates noncompliance with every conjugal duty. The party abandoning his or her spouse violates his or her matrimonial duties, that is, he or she fails to comply with the principle *foedus nuptiale servandum est*, because the spouse's attitude consists precisely of a dissolution, in the sphere of social reality, of the conjugal *consortium.*

Malicious abandonment constitutes a cause for temporary separation, based on a principle distinct from those that are the basis in other causes of temporary separation: violation of the principle *foedus nuptiale servandum est.* While the criterion for admissibility of a factual situation as a cause of separation is none other than that of implying a clear and unequivocal violation of one of the five principles informing married life (see commentary on c. 1151, 2), and cc. 1152 and 1153 are deduced from an analysis thereof, malicious abandonment is defined as the break-up of the conjugal consortium on the plane of social reality.

With the concept of malicious abandonment, one is not seeking separation, because in fact it already exists; nor is there danger to the spirit or body of the other spouse, which can be involved in cohabitation, in that there is no longer cohabitation. With invocation of the concept of malicious abandonment, there is an attempt to declare guilty the spouse who has maliciously been absent and to obtain the legal declaration of separation for the one who has been abandoned.

Because of its importance as a cause for separation, which requires fault on the part of the absent spouse, jurisprudence indicates the following requirements for malicious abandonment:

a) *Abandonment or separation of fact.* There must be *de facto* abandonment or separation. Abandonment is understood to exist if the spouse leaves the conjugal domicile or prevents the other spouse from entering it.

b) *Intent to disavow the fulfillment of conjugal duties.* The departure from the conjugal domicile must take place with the desire to abandon compliance with conjugal rights or obligations. A temporary absence to fulfill a lawful and reasonable objective does not constitute malicious abandonment.

c) *Without just cause.* There must not be any just cause for the unilateral decision to depart from the conjugal domicile.

In short, the concept of malicious abandonment is the procedure to convert a *de facto* separation unjustly created by one of the spouses into a *de jure* separation.

5. *Form of establishing temporary separation* (c. 1153 § 1)

Conjugal separation is a matter of interest to the public good and cannot be done without the intervention of the public authority. In a marriage between baptized persons, this intervention belongs to the competent ecclesiastical authority. Nevertheless, c. 1692 § 2 indicates that "Where the ecclesiastical decision does not produce civil effects, or if it is foreseen that there will be a civil judgment not contrary to the divine law, the Bishop of the diocese in which the spouses are living can, in the light of their particular circumstances, give them permission to approach the civil courts" (see commentary on c. 1692).

Since the intervention of the public authority is necessary for temporary separation, this separation can take place, as an exception, on the spouses' own authority, if there is a legitimate cause for separation and a delay involves danger.

1154 **Instituta separatione coniugum, opportune semper cavendum est debitae filiorum sustentationi et educationi.**

When a separation of spouses has taken place, appropriate provision is always to be made for the due maintenance and upbringing of the children.

SOURCES: c. 1132

CROSS-REFERENCES: cc. 104, 100–106, 1152, 1153

COMMENTARY

Javier Escrivá Ivars

Canon 1154 establishes a generic principle since the arrangement for the children is mostly a question of civil effects that devolve upon civil judges. This canon recommends that, once spouses separate, appropriate provision is to be made for the due maintenance and upbringing of the children. This provision refers to cases of perpetual separation due to adultery, as well as to cases of temporary separation for other causes. The duty-right of the parents for the upbringing and maintenance of their children involves an extremely serious obligation and separation does not in principle absolve them of that responsibility.

With regard to the domicile of separated spouses, c. 104 provides: "Spouses are to have a common domicile or quasi-domicile. By reason of lawful separation or for some other just reason, each may have his or her own domicile or quasi-domicile." Pursuant to c. 104, any lawful separation is sufficient for each spouse to acquire his or her own domicile or quasi-domicile. For these purposes, cc. 100–106, which govern the acquisition and loss of the local see of the person, would apply.

1155 **Coniux innocens laudabiliter alterum coniugem ad vitam coniugalem rursus admittere potest, quo in casu iuri separationis renuntiat.**

The innocent spouse may laudably readmit the other spouse to the conjugal life, in which case he or she renounces the right to separation.

SOURCES: c. 1130

CROSS REFERENCES: cc. 1152, 1153

COMMENTARY

Javier Escrivá Ivars

Canon 1155 is a norm that, through its text and systematic placement applies both to permanent and temporary separation of spouses.

The invitation to reconciliation, and consequently to the restoration of the common conjugal life expressly formulated in the text of c. 1155, and the exhortation to pardon on the part of the party offended by adultery with which canon 1152 begins and ends its text, are a faithful reflection of the pastoral zeal that the canonical legislator has desired to imprint on the norm of the separation of spouses. In these cases various reasons, mutual misunderstandings, and an incapacity to open oneself to interpersonal relations, etc., can lead the validly married couple to a rupture that is frequently irreparable. Pastoral zeal manifests the intent to maintain the unity of the family and the mutual respect of spouses, promoting fidelity even during the separation (see commentary on canon 1152: no. 3,c) and encouraging cultivattion of the necessary pardon, proper to Christian love, and the ability to eventually restore the previous conjugal life.

Now, the full re-establishment of the common conjugal life, once the cause that gave rise to the disturbance *in facto esse* elements is eliminated or reduced, involves a situation of complex juridic nature, not easily synthesized into a unified concept.[1]

It is necessary, therefore, to be aware of those difficulties in order to construct a unified concept of restoration of the common conjugal life. The variety of situations that embraces the generic principle *restoration*

1. Of related interest, cf. R. NAVARRO VALLS, "La restauración de la comunidad conyugal," in *Estudios de Derecho Matrimonial* (Madrid 1977), pp. 127–185; L. DEL AMO, "Restauración de la comunidad conyugal cuando cesa la causa de separación," in *Revista de Derecho Privado* (1964), pp. 1000ff.

of common conjugal life arises from very many factors. If the common conjugal life in the strict sense can be altered in all or some of its integral positions, i.e., total or partial separation; if total separation has diverse juridical meaning according to causes arising from adultery or other reasons; and if, from a formal point of view, in both permanent and temporary separation, it establishes a triple differentiation—judicial, conventional, or unilateral—then a later restoration of the common conjugal life will have a specific character under each one of the following assumptions:

1. *In the case of permanent separation for adultery*

a) *The pardon of the offended party after the sentence of separation*

If the separation is caused because of adultery, the innocent spouse has the right not to admit perpetually the adulterous spouse to the common conjugal life. This is, evidently, a right of the innocent spouse, not an obligation. The innocent one can, then, freely renounce this right and readmit the adulterer back to the common conjugal life. The reestablishment of conjugal life, and therefore, the suspension of the juridical situation of perpetual separation, depends on the act of the will of the innocent one (the pardon). The adulterer can not oppose the restoration because of the legal imperative with which he or she is obligated to said restoration.

In order that the common conjugal life be necessarily restored, a judicial sentence is required that evaluates the existence of pardon, a pronouncement which, in accord with what is foreseen in c. 1152 § 2, must keep in mind the existence of the express will of the forgiving spouse. That express will would be the most demonstrative indication that the suitable resumption of conjugal life after perpetual separation was judicially decreed.

b) *Compensation for adultery*

In the situation where the innocent spouse commits adultery after the judicial sentence of perpetual separation, one can understand that the necessary restoration of the common conjugal life would not be required as a compensation for adultery, for two reasons: that the first adulterer lost all rights to the body of the other, and that admitting such a hypothesis, an uncertainty would be introduced to the acquired juridical status and would injure juridical certitude.

c) *Impugning of the efficacy of the sentence of separation on the part of the adulterous spouse*

The admission of this hypothesis does not seem possible, given the tenor of c. 1152, according to which the innocent spouse can separate "forever." Additionally, the *CIC* does not expressly foresee such a possibility.

d) *Impossibility of restoration of common conjugal life*

The impossibility of the restoration of common conjugal life is an exceptional situation. This situation occurs when one or both spouses have embraced the religious state, or the man has received Holy Orders. This change of state must be expressly consented to by the innocent spouse. In the situation of a change of state in life on the part of the innocent spouse, no additional authorization is required on the part of the guilty party, given that this party has lost all rights with respect to the other.

2. *The case of temporary separation*

Because of the nature of marriage, when the cause of the temporary separation of spouses ceases, conjugal cohabitation must always be reestablished unless the ecclesiastical authority determines otherwise, as it is sanctioned in c. 1153, § 2.

In a temporal separation granted by an ecclesiastical authority, the more-or-less length of its duration is not fixed only as a result of the gravity of the cause or of guilt. The nature of the separation is not in response to a sanction, nor is it a penalty for crimes or injuries committed by a spouse, but rather it is a remedy, a means of defense against the danger of future evils. In any case, the longer or shorter duration of a temporal separation will depend on the combination of the gravity of the evil and the duration of the danger. Because the duration of these future evils is not always easy to determine, the separation is usually granted for an indefinite time, that is, as long as the cause lasts.

Temporary separation, inasmuch as it has been granted for both determined and undetermined times, must cease at the moment in which the cause for which it was granted ceases. If the separation has been decreed by juridical sentence, the normal procedure would be that a new sentence declare the cessation of the cause of juridical separation.

If the cause has ceased *before the period of the granted separation has ended*, the innocent spouse can request the competent authority to decree the cessation of the cause, so that again, both spouses would be obligated to cohabit. The innocent spouse does not have the obligation to reestablish the conjugal cohabitation if the indicated time has not ended, if the separation was decreed for an indefinite time, or as long as the authority has not decreed the cessation of the cause or that the spouses must restore common life.

On his part, the spouse who was the reason for the cause of separation does not have the right to require juridically the restoration of the common conjugal life while the reason lasts that gave to the other spouse the excuse from living together, or as long as the period indicated by the authority has not expired.

If the separation occurred by a spouse's own authority, without intervention of the ecclesiastical authority, it is understood that the restoration of common life must take place as soon as the cause that gave origin to the separation has ceased.

3. *The case of separation by mutual consent*

Mutual consent does not constitute a legitimate canonical cause to decree separation, except in the situation of a change to a new state by one or both of the spouses; that is, when one or both have embraced the religious state or when the man has received Holy Orders. In these situations, the separation is understood to be perpetual.

CAPUT X
De matrimonii convalidatione

ART. 1
De convalidatione simplici

CHAPTER X
The Validation of Marriage

ART. 1
Simple Validation

1156 **§ 1. Ad convalidandum matrimonium irritum ob impedimentum dirimens, requiritur ut cesset impedimentum vel ab eodem dispensetur, et consensum renovet saltem pars impedimenti conscia.**

§ 2. Haec renovatio iure ecclesiastico requiritur ad validitatem convalidationis, etiamsi initio utraque pars consensum praestiterit nec postea revocaverit.

§ 1. To validate a marriage which is invalid because of a diriment impediment, it is required that the impediment cease or be dispensed, and that at least the party aware of the impediment renews consent.

§ 2. This renewal is required by ecclesiastical Law for the validity of the validation, even if at the beginning both parties had given consent and had not afterwards withdrawn it.

SOURCES: § 1: c. 1133 § 1; SCHO Resp., 19 iul. 1955
§ 2: c. 1133 § 2

CROSS REFERENCES: cc. 1075–1082, 1107

COMMENTARY

Alberto Bernárdez Cantón

1. When a marriage has been determined to be null because of lack of essential requirements, juridic validity can be restored through an act of confirmation or revalidation without the necessity of a new celebration. This restoration can be accomplished by completing or supplying some of the elements whose absence created the invalidity.

Revalidation can be achieved by two distinct methods: simple convalidation or *senatio in radice*. These methods are regulated separately in the *CIC* in this chapter. These methods differ regarding both the efficient cause of the revalidation and its effects.

Simple convalidation is the ordinary means of revalidating a marriage; it takes place through the manifestation of consent of at least one of the parties, and it produces its effects from the moment of the convalidation. In cases in which this consent must be given according to canonical form, there is a new celebration of the marriage and not just a convalidation in the strict sense.

In contrast, sanation is an extraordinary means. It does not operate by a consensual act of the contractants, but rather through a decision of the ecclesiastical authority. Its canonical effects are produced with a character that is retroactive through a legal fiction.

2. The Code of Canon law does not contain a legal definition of simple convalidation as it occurs in the case of a sanation. We could define it as that form or type of convalidation which, as soon as the cause of nullity of the marriage has ceased, occurs by means of a true manifestation of matrimonial consent (a renewal or new given according to the case), by at least one of the parties.

In this norm, the convalidation is undertaken through the hypothesis that the marriage had become null by the cause of a diriment impediment, and therefore the law requires the renewal of consent.

3. Leaving aside the discussion of diriment impediments, once the *CIC* had omitted the category of impediments,[1] § 1 points out two requirements for the convalidation to take place: the cessation of the impediment, and the renewal of consent.

a) The cessation of the impediment can take place by the removal of the cause (completing canonical age, conversion of the unbaptized party, etc.), or by a dispensation by the ecclesiastical authority. Convalidation is

1. Cf. A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico*, 8th ed. (Madrid 1994), pp. 55–56 and 63.

impossible, therefore, when the impediment has not in fact ceased, either by not having been dispensed, or by the cause of the impediment not having ceased to exist, orby the fact that the cause will not cease because by its nature it is perpetual and not dispensable.

The impediment can also be removed by the derogation of the norm that established it. With reference to marriages nullified through the contravention of impediments existing before the *CIC*/1917 and which were derogated by it, the CPI, in a response of June 2–3, 1918, declared that these marriages were not convalidated because of the promulgation of the *CIC*, but a dispensation was not needed in order to allow for their convalidation.[2] This doctrine must be applied in relation to the matrimonial impediments derogated by the current *CIC* dealing with the convalidation of null marriages celebrated prior to when the present Code came into effect.

One could pose the question as to whether the convalidation of a null marriage is possible if it is a case of an impediment of divine law, which afterwards would have ceased. Given that the *CIC* does not foresee this situation in c. 1156, as it does in the case of senation (cc. 1163 § 2, and 1165 § 2), then in the same manner the celebration of a new marriage would not be unsuitable once the impediment ceased and neither would its convalidation.

If, on the contrary, after an invalid celebration some impediment came into being, it would be necessary to obtain the appropriate dispensation, if such a dispensation is possible, in order to proceed with the convalidation.

b) Regarding the renewal of consent: since these requirements are outlined in great detail in the following canons, we refer in the following section only to the most necessary comments.

4. In § 2, two important concepts are affirmed: a) the renewal of consent is necessary for the validity of the convalidation even though the parties had consented from the beginning and had never revoked their consent afterwards; b) this requirement is a norm of ecclesiastical law.

a) In the situation of a marriage invalidated by reason of an impediment, which is the type considered in this canon, the cessation of that impediment through the removal of the cause or its dispensation is not enough. Instead, because this situation is of a constitutive character, there must be a renewal of the consent, and without it, convalidation would not be effected. It is presumed that there was matrimonial consent, because if this were not the case, we would be presented with a different situation, that is to say, the one considered in c. 1159. Still, the renewal of consent is necessary by the express imperative of the legislator. We would not be able to talk about renewal if there had not been previous consent.

2. Cf. *AAS* 10 (1918), p. 346

For the same reason, it becomes irrelevant if the consent had been revoked later, because its renewal has constitutive character. Because of this fact there is really no point in analyzing at this time the diverse acts that this revocation can imply (see commentary on c. 1158).

b) The renewal of consent, even though it may have previously existed, is required by the disposition of positive ecclesiastical law. Curiously, the *CCEO* does not make this declaration, an omission which, to our understanding, is not especially significant (c. 843 § *CCEO*). It is obvious that if there had not been consent, the giving of this *ex novo* would seem to be specified by natural law. With this declaration, the legislator supports the theory that mutual consent given with the intention to remain bound by matrimony is by its nature sufficient, even though it can become juridically inefficacious by the incompletion of some requirement external to the consensual act itself, a requirement imposed by the legal system by virtue of legitimate power that the ecclesiastical legislator uses for the juridical discipline of marriages of the baptized. In this theory it is not necessary that the consent of both parties be expressed in the same moment and in the same juridical act. Instead, it is sufficient that persevering consent from one party should be united with the consent of the other so that from that moment in which the union of both wills occurs, one would consider the marriage to be concluded or perfected. Along the same line of thinking, if the mutual consent perseveres, one would have to hold the contract to be concluded and the conjugal bond to be constituted if the obstacles that made the marriage inefficacious are removed (for example through a dispensation or substantial form). But the ecclesiastical legislator wanted something else, and has thus imposed the necessity of renewal for the validity of convalidation.

From the positive character of this requirement, the following consequences result: 1°) the dispensation of this renewal is possible, just as it is in a sanation; 2°) the law only requires renewal on the part of the party who knows of the existence of the impediment; 3°) and the law of renewal only binds those who are obligated to the fulfillment of ecclesiastical laws (cc. 11 and 1059). Because of these consequences, the marriage of the unbaptized can be convalidated by the removal of those impediments of natural law or of civil law by which they may be bound.[3] Bender therefore concludes that in order to deduce that a marriage between the unbaptized is null, it is not sufficient to establish that it was null from the time of its celebration. We must also question the convalidation of a marriage where the obstacle that opposed its validity ceased but the initial consent persisted.

3. Cf. L. BENDER, "Convalidation du mariage," in *Dictionnaire de Droit canonique*, IV (Paris 1949), col. 543; J. BANK, *Connubia canonica* (Rome 1959), p. 568

1157 Renovatio consensus debet esse novus voluntatis actus in matrimonium, quod pars renovans scit aut opinatur ab initio nullum fuisse.

The renewal of consent must be a new act of will consenting to a marriage which the renewing party knows or thinks was invalid from the beginning.

SOURCES: c. 1134

CROSS REFERENCES: cc. 1157, 1100

COMMENTARY

Alberto Bernárdez Cantón

This canon describes what constitutes renewal of consent, which is a constitutive and essential element in the case of a marriage nullified by reason of an impediment. An analysis of the text reveals the following points about the nature of renewal of consent: 1) it consists of a new act of the will; 2) it must be matrimonial consent; 3) it must be given by the one who knows, or who is of the opinion that, the marriage was null from the beginning.

1. There must be a new act of the will, that is to say, a new free decision made in this concrete moment. A virtual free act given previously, continuing in its effects, and which has not been revoked, would be insufficient according to our understanding. The idea that a virtual free act is not sufficient in itself is deduced, furthermore, from what was established in the previous canon: "This renewal is required ... even if at the beginning both parties had given consent and had not afterwards withdrawn it." Interpretive or presumed intention would be insufficient for convalidation.

Because of this understanding of the free will act, doctrine points out that one must not consider "renewal of consent" the pure complacency of the party in his/her marriage, nor even a manifestation tending to confirm a previous consent. In this light it makes sense to question what the relationship of this new act of the will is with respect to the original consent (if this was sufficiently given) or whether, on the contrary, we must consider that consent to be completely non-binding. This new and different consent cannot be considered unrelated to that consent given previously because it will often be actualized and demonstrated in coherence with the consent that has already been given, which consent is understood to persevere. Whatever the case, said consent deals with a marriage that resulted in invalidity, but which created an appearance of a

marriage by virtue of the at least external declaration of the will. In this respect it is good to remember that renewal is only required, sometimes, by the one who is conscious of the nullity.

2. The new consent has to be "in matrimonium." It must bring together all of the requirements of a true conjugal consent, that is to say, with the will to establish a common conjugal life between the spouses without excluding any of the essential elements.

3. The renewal can be bilateral or unilateral according to whether the nullity was known by both parties or by only one of them. Given that simple convalidation has as its object validating a marriage that was nullified, one supposes that whoever undertakes it must know precisely about the existence of the nullity, and must renew consent independently of whether they had attempted the marriage in good or bad faith.

On this point the *CIC* has modified the text of the previous code. The *CIC*/1917 said "in matrimonium quod constet ab initio nullum fuisse." In the new Code we read "in matrimonium quod pars renovans scit aut opinatur ab initio nullum fuisse." With this innovation, the legislator has clarified the doubts that the previous formulation generated on whether certainty of nullity is required or whether a convalidation also is necessary in the case of a well-founded doubt concerning the validity of the marriage. The latter understanding was more logical, as indicated by Miguelez,[1] if we do not wish to fall into absurdity. The new formulation of the current *CIC* clearly admits convalidation of marriage in the case not only of certainty, but also in the case of opinion that the marriage was null. If in the case of doubt we must be for the marriage (c. 1060) even in the internal form (this could be the basis of the former canon, because convalidation is not necessary while the doubt exists—the more or less common opinion does not exclude doubt) the current *CIC* has kept in mind that convalidation also can be a good way to ease one's conscience, aside from the customary presumptions.

In this respect it is important to remember that "knowledge of or opinion about the nullity of a marriage does not necessity [*sic*] exclude matrimonial consent." (c. 1100) This "does not necessarily exclude" phrase does not mean to say that it would be impossible if in fact matrimonial consent is excluded, since doubts can also emerge concerning the sufficiency of consent given on the part of the one who knew secretly or at least suspected that the marriage had to be null by reason of impediment. This was the intent of the new revision of this norm.

1. Cf. L. MIGÚÉLEZ, "El matrimonio," in *Comentarios al Código de Derecho canónico*, II (Madrid 1963), pp. 725–726.

1158 **§ 1. Si impedimentum sit publicum, consensus ab utraque parte renovandus est forma canonica, salvo praescripto can. 1127 § 2.**

§ 2. Si impedimentum probari nequeat, satis est ut consensus renovetur privatim et secreto, et quidem a parte impedimenti conscia, dummodo altera in consensu praestito perseveret, aut ab utraque parte, si impedimentum sit utrique parti notum.

§ 1 If the impediment is public, consent is to be renewed by both parties in the canonical form, without prejudice to the provision of Can. 1127 § 2.

§ 2 If the impediment cannot be proved, it is sufficient that consent be renewed privately and in secret, specifically by the party who is aware of the impediment provided the other party persists in the consent given, or by both parties if the impediment is known to both.

SOURCES: § 1: c. 1135 § 1
§ 2: c. 1135 §§ 2 et 3

CROSS REFERENCES: cc. 1074, 1108–1116, 1125–1127, 1156, 1130–1133

COMMENTARY

Alberto Bernárdez Cantón

1. This canon continues to refer to a marriage that is nullified by reason of an impediment, and its object is to specify the form in which the renewal of consent must take place. It is related very closely to canon 1156 § 1, and consequently, one must keep in mind that in order for it to be effective, it must be preceded by the cessation of the impediment in the terms indicated in the commentary on this norm.

As a guideline in resolving various cases, a good starting point is to consider whether the impediment is either public or occult, according to the terminology in c. 1074. In reality, this canon associates a public impediment with an "impediment which cannot be proven." On the other hand, the *CCEO* relies on terminological uniformity and distinguishes between public and occult impediments (c. 845). It agrees, furthermore, with the Latin Code regarding the juridic treatment of both cases.

On the basis of this distinction, the *CIC* provides two distinct forms of convalidation. Whether one or the other is employed depends on whether the impediment was occult or public, so that if the marriage had

been convalidated in a private and secret form because the impediment was considered occult, and it should then happen that it can be proven in the external forum, it would have to be held as invalidly convalidated because it had not been executed in the form established by this canon. In this way the difficulty that could arise if the marriage should be convalidated in the internal forum but proven null in the external forum is resolved.

2. If the impediment is public—that is to say, "can be proven in the external forum"—one must proceed to a new celebration of marriage and the new giving of consent according to the juridically prescribed formula. This is not a matter of convalidation in the strict sense. It is understandable that if a marriage is null and if that nullity can be juridically proven, it must be celebrated according to the precisely established procedure in order that there be proof of it.

Now, given that a public impediment is not the same as an impediment divulged to and known by a more or less wide sector of persons, the marriage could be celebrated as a secret marriage, or one of conscience (cc. 1131–1133), when the circumstances exist that would permit its use. In other words, when the precise circumstances are present, the new marriage would be able to be celebrated in the extraordinary form (c. 1116).

This canon indicates that what is prescribed in c. 1127 § 2 must be safeguarded. Curiously, the *CCEO* omits this reference (c. 845 § 1), perhaps because it is unnecessary, since one is dealing with a celebration *ex novo*. In the official edition of the *CIC*, the reference is made to § 3 of c. 1127. A correction of errata on April 22, 1983 indicated that the reference should rather have referred to § 2.[1] This is much more logical, since § 2 refers to the possible dispensation from form, while § 3 contains some cautions regarding the act of celebration. In any case, it seems that all of the content of c. 1127 must be observed as it would be in any mixed marriage. We can thus see why the *CCEO* omits this reference.

3. If the impediment is occult, it is enough that consent be renewed privately and in secret. Because the canonical form is not specified, this becomes a case of convalidation in the proper sense. Renewal of consent is given by one or both parties according to the existence of the impediment or its cessation, whether it is known only by one of the parties or by both of them. In unilateral renewal, the perseverance of the other party is required. Consent must be renewed privately and secretly in the bilateral renewal case. It is not necessary to follow any particular special form. Because it is private, substantial juridic form is not required (nor is a qualified minister nor two witnesses); because it is secret, there is no revelation. One must distinguish, however, between bilateral or unilateral renewal.

1. Cf. *AAS* 75 (1983), p. 324.

In the first case the consent of both has to be mutual and reciprocal, expressed through words or signs mutually given to each other as husband and wife. As Lombardia says in this respect "internal will and manifestation is necessary; this manifestation, because there is no form to be received by the other and its efficacy is not dependent on the requirement of a specific form in its expression, can be given in any way which shows that the will of each spouse is clear to the other: a private declaration or a behavior which proves the existence of matrimonial consent.[2]" Some authors believe that this consent can be expressed even by means of sexual relations expressing marital affect, and that these acts would not be considered fornication.[3] It does not seem that this is an adequate way of expressing matrimonial consent, given that sexual relations in themselves are not juridic acts (although they may be free acts, they are not a declaration of the will), and also given that the distinction between conjugal affection and fornication is purely internal. Objectively there is no difference between sexual relations that take place after the cessation of the impediment and those that had taken place during the married life, many times continued in good faith, without any presumption of the intent to fornicate.

Only in the case in which the supposed spouses, after the cessation of the impediment, agree to have relations as a sign of their matrimonial consent, can this consent be considered to be renewed; analogously if the supposed spouses should live apart (for example, to avoid the risk of sin until they obtain a dispensation) and once the dispensation has been obtained they re-establish conjugal life or have relations, one would have to understand that these acts were an expression of the renewal of consent.

Some authors indicate that, in the case of bilateral renewal, it is advisable to verify the manifestation of consent in the presence of a priest, even if this priest does not have the faculties to assist at marriages. This would be done in order to ensure the normal renewal of consent.[4]

The unilateral renewal of consent—only on the part of the one who has knowledge of the impediment and of its cessation—offers greater difficulties. In this case, Lombardia states "a unilateral act which is 'private and secret' is sufficient, not only is the form of reception absent, but one can only speak of the form of expression in an excessively theoretical manner. In reality, this is the case of the party who has to renew consent,

2. P. LOMBARDÍA, "Supuestos especiales de relación entre consentimiento y forma," in *Derecho canónico*, II (Pamplona 1974), p. 139.

3. Cf. L. MIGUÉLEZ, "El matrimonio," in *Comentarios al Código de Derecho canónico*, II (Madrid 1963), p. 726; F.M. CAPPELLO, *Tractatus canonico-moralis de Sacramentis*, V, (Turin-Rome 1950), p. 850; A. MOSTAZA, "Matrimonio," in *Nuevo Derecho Parroquial* (Madrid 1990), p. 541; P. GASPARRI, *Tractatus canonicus de matrimonio*, II (Rome 1932), pp. 254 and 257.

4. Cf. L. BENDER, "Convalidation du mariage," in *Dictionnaire de Droit canonique*, IV (Paris 1949), col. 544.

to commit oneself in conscience, and express it in some manner, given that this is the case of a juridic act."[5]

The root of the problem is found in that the *CIC*/1917 modified the older law that required that the party who was ignorant of the impediment should be notified of the renewal of consent done by the other. This change intended to avoid the risk that, upon knowing of that nullity, the formerly ignorant party would refuse to have the marriage convalidated.[6]

Thus, we arrive at the incongruity of consent that must be given anew and made externally (in order that it can be a true juridic act), but which does not have to be manifested to anyone. Many authors abstain from determining how this unilateral renewal must be done. Other authors, as in the previous case, propose that the renewal of consent can be done through simple conjugal relations with marital affection. As in the previous case, Bender advises that unilateral renewal be manifested to a priest.[7] We do not consider these solutions to be satisfactory. We have already treated the value of conjugal relations as a sign of consent. With regard to the manifestation before a third person, even though that be a priest, we state that the receiver of marital consent must necessarily be the other party.

An attempt at a solution can be made in two ways:

— Given that the receiver of matrimonial consent is the other party, and this person does not have to be notified of the convalidation, the party who renews the consent, in the case that it would not be opportune to verbally tell, could make external their internal consent in whichever form that reveals their matrimonial consent, even though the other party is not able to interpret it as a renewal as such. One example could be the exchange of marital rings, whatever the pretext, or the special commemoration of a wedding anniversary. It is understood that the case of reconcilation after a period of distance or separation could also be valid in renewing consent.

— Given the specifics of the case, one might also think that the legislator might have offered a particular form of convalidation in the internal form of conscience, because the *natural* sufficiency of consent given at a certain moment and its *natural* efficaciousness once the impediment has ceased would have attenuated the requirement of *ecclesiastical law* for the renewal of consent; therefore, the law would be content that the renewal occurs with an internal act of the will without any other manifestation.

In the case of unilateral renewal the perseverance of the consent of the other party is necessary. In principle, "the consent given is presumed to persist until its withdrawal has been established (c. 1107)." According

5. P. LOMBARDÍA, "Supuestos especiales...," cit., p. 139.
6. Cf. X. WERNZ-P. VIDAL, *Ius canonicum*, V (Rome 1925), p. 793, footnote 11.
7. Cf. L. BENDER, "Convalidation du mariage...," cit., col. 544.

to Hervada, "whereas perseverance presupposes a continuous situation—a state of mind—revocation is the act that breaks this perseverance, this state of mind ... the state of mind that consists of a radical acceptance of spouses as such is the persevering consent."[8] The permanence or perseverance of consent is equivalent to the virtual willfulness of an act that was given at a certain moment, and which, maintaining its effects, has not been revoked. The continuity of conjugal life will be, generally speaking, the most clear expression of the perseverance of matrimonial consent.

The revocation of consent is a positive act of the will, contrary to the consent initially given, and will consist, as Hervada says, in the firm and obstinate will not to be spouses anymore.[9] This positive act of the will must be proven as a way of overturning the presumption *juris tantum* of the canon last cited. It does not just take place when the will to hold the matrimonial bond or its rights and duties as canceled is expressed in a clear and categorical way, but also through acts or conduct clearly contradictory to the accepting of the conjugal state, and with which the person does everything possible to abandon his or her spouse. Interpretive or presumed revocation is not sufficient. This revocation would take place if one suspected, including with certainty, that the party who consented would not be willing to renew consent, or that he or she would be ready to positively revoke it if he or she had knowledge of the nullity of marriage and the possibility of being declared free of matrimonial obligations.[10]

Canonical doctrine has concerned itself with the evaluation of the revocatory meaning of certain attitudes proper to the situation of conflictive marriages. Thus, for example, legal separation, especially if a just cause exists, does not imply in itself revocation of consent because it does not extinguish the bond, and the spouses can resort to it when they have a just cause. On the other hand, the unilateral and arbitrary rupture of conjugal community (malicious abandonment), above all if it is followed by the beginning of a pseudo-marital cohabitation, is taken to be indicative of revocation.

Analogically, the petition of civil divorce, and with greater reason, the subsequent celebration of a civil marriage, is an unequivocal sign of revocation. The same significance is given, in our consideration, to the petition or request for a canonical dissolution of *ratum* and *non-consummatum* marriage or of a natural marriage in favor of the faith, because these cases reveal that the subject wants on his or her own part to end the matrimonial bond.

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8. J. HERVADA, "La revocación del consentimiento matrimonial," in idem, *Vetera et Nova*, I (Pamplona 1991), pp. 737–741.
9. Cf. ibid., p. 748.
10. Cf. TH.M. VLAMING-L. BENDER, *Praelectiones iuris matrimonii* (Bussum, Netherlands 1950), p. 526; J. CHELODI, *El Derecho matrimonial* (Barcelona 1959), pp. 319–320; c. PINNA, January 30, 1964, in *SRR Dec* 56 (1964), p. 64.

Regarding the petition for nullity of a marriage begun before an ecclesiastical tribunal, other authors have distinguished between the case in which a definitive sentence of nullity has been given and the case in which the cause is pending. They affirm that only in the first case can one consider the consent revoked, while in the second case, the revocation would only be of conditional character, that is to say, subordinate to the obtaining nullity.[11] This analysis does not appear to be correct, however. As Jemolo says, the most palpable proof of revocation of consent is the petition of nullity.[12] With it, the petitioner is denoting his or her resolved, firm, and decisive will to consider matrimonial relations ended. A different question is whether, in the case where the sentence would be *pro vinculo*, resulting in reconciliation of marriage, one would consider that the petitioner should have to give up his or her revocation, thus restoring the couple to their initial situation.

There is also the possibility that, through the matrimonial life, substantial changes might have been introduced with respect to the essential goods of marriage that would involve a revocation of consent, at least in regard to natural sufficiency, which would make unilateral convalidation impossible in a given case.

Finally, it should be noted that if the party who does not have to give consent *(a fortiori* if this one would be the one that had to renew it), has fallen mentally ill, unilateral convalidation of the marriage would be impossible.[13] This is not because the sick one would have revoked consent (of which revocation he or she would be incapable by his or her particular psychological illness), but because of his or her incapacity to give it. This analysis is by analogy with the case of the proxy who becomes insane, as is foreseen in c. 1105 § 4.

11. Cf. X. WERNZ-P. VIDAL, *Ius canonicum...*, cit., p. 807; L. MIGUÉLEZ, "Matrimonio...," cit., p. 730; sentencias rotales *coram* PINNA, January 30, 1964, in *SRR Dec* 56 (1964), pp. 64–65 and *coram* FIORE, June 15, 1964, ibid., p. 479.

12. Cf. A.C. JEMOLO, *Il matrimonio nel diritto canonica* (Milan 1941), p. 315; J. HERVADA, "La revocación...," cit., p. 749.

13. Cf. L. MIGUÉLEZ, "El matrimonio...," cit., p. 730; J. HERVADA, "La revocación...," cit., p. 743.

1159 **§ 1. Matrimonium irritum ob defectum consensus convalidatur, si pars quae non consenserat, iam consentiat, dummodo consensus ab altera parte praestitus perseveret.**

§ 2. Si defectus consensus probari nequeat, satis est ut pars, quae non consenserat, privatim et secreto consensum praestet.

§ 3. Si defectus consensus probari potest, necesse est ut consensus forma canonica praestetur.

§ 1 A marriage invalid because of a defect of consent is validated if the party who did not consent, now does consent, provided the consent given by the other party persists.

§ 2 If the defect of the consent cannot be proven, it is sufficient that the party who did not consent, gives consent privately and in secret.

§ 3 If the defect of consent can be proven, it is necessary that consent be given in the canonical form.

SOURCES: § 1: c. 1136 § 1
§ 2: c. 1136 § 2
§ 3: c. 1136 § 3

CROSS REFERENCES: cc. 1057, 1095–1103, 1108–1116

COMMENTARY

Alberto Bernárdez Cantón

1. The assumption considered in this canon differs substantially from that regulated in the three previous canons. Here, we are not dealing with a consent naturally sufficient but intercepted by a legal obstacle foreign to the will, but rather, with the absence of this naturally sufficient consent. By the wording of this canon, the legislator does not speak of renewal of consent, but of its giving. What is foreseen in canon 1156 § 2 does not apply in this case, because the consent here required is not that of ecclesiastical law, but of natural law according to the irreplaceable nature of the consent (cf. c. 1057 § 1). However, it deals with a true convalidation (except when the new celebration of matrimony is required). Its convalidation is not by renewal of consent, but by giving consent, given that it operates upon the existence of an appearance of matrimony correctly celebrated with regard to the observance of the prescribed form.

With the legal term "defect of consent" we designate both the absence or lack of consent and the vitiated nature or defect of the consent given; both the nonexistence and the insufficiency of consent may have existed. The situation of lack of consent will exist, for example, in the cases of natural incapacity, mental disorder, the lack of internal freedom, total simulation, ignorance regarding the substance of marriage, error concerning the identity of the person, and condition not completed. The situation of defect of consent will exist in the cases of partial simulation, fear, *dolus*, and error about the quality directly and principally intended (see commentary on cc. 1095—1105).

It is a common understanding that all of the cases of lack or defect of consent are able to be convalidated through the procedure foreseen in this canon, and reciprocally that convalidation must be verified by the one who decreed it. The passage of time or the prolongation of conjugal life would be insufficient.[1] In effect, it is clear that the Code Commission rejected the proposal that the null marriage would remain convalidated *ipso jure* because of fear or *dolus* by free cohabitation for three years from the moment in which the fear ceased or in which the fraud was discovered.[2]

This canon enunciates is the necessity that the party who did not consent should do so, provided that the consent of the other perseveres. Also, regarding the form in which the consent must be given, it distinguishes the case of occult defect of consent and public defect of consent.

2. The canon is based on the supposition that the defect of consent or its lack is due to only one of the parties, requiring of the other only perseverance. If the defect or lack of consent has originated with both, both must give their mutual consent; simple perseverance does not apply to this case.

Consent has to be lent precisely by the spouse who did not consent and not by the spouse who is aware of the circumstance. Normally, it would be the same, but sometimes, it might not be, as for example, in the case of *dolus*. This requirement is absolutely necessary given that consent cannot be supplied by natural law; therefore, all of the requirements of true matrimonial consent must be brought together, without an act of the presence of the defect or lack that determined the nullity of the marriage or others of invalidating efficacy. These circumstances suppose logically that the causes that motivated the nullity of marriage would have ceased; thus, for example, the psychological incapacity must have ceased in order

1. Cf. P. FEDELE, "In tema de convalida del matrimonio canonico nullo per difetto o vizio di consenso," in *Studi di diritto canonico in onore di Marcelo Magliocchetti*, II (Rome 1975), pp. 487–513; A. MARTÍNEZ BLANCO, "Una configuración nueva de la sanación simple del matrimonio canónico," in *Revista Española de Derecho Canónico* 32 (1976), pp. 241–282; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado* (Madrid 1987), p. 273.
2. Cf. *Comm.* 5 (1973), p. 90.

to contract the marriage; ignorance concerning the substance or error concerning the identity of persons must have been overcome; or the condition concerning the past or the present must have been purified. The same argument applies to the cessation of coercion, of *dolus*, and of any other defect. We are speaking here of matrimonial consent that must bring together all of the requirements *ad valorem*.

The perseverance of the consent of the other party is also necessary in order that the accord of wills should be effectuated. This perseverance is essential to the conjugal pact. Regarding the questions that provoke this position, see commentary on c. 1158.

3. With respect to the way in which consent must be given by the party who did not consent, the *CIC* adopts the same criterion maintained with regard to nullity by impediment, that the defect of consent could or could not be proven, or that this be occult or public in a sense attributed to these terms in c. 1074.

On this point the *CIC* has modified what was foreseen by *CIC*/1917, which had the following tenor: "if the lack of consent was merely internal, it is enough that internally the party that had not consented, should consent" (c. 1136 § 2). "If it was also external it is necessary that consent be manifested also exteriorly or in the form prescribed by law, if the defect of consent is public or in another form private and in secret, if it is occult" (c. 1136 § 3). The simplification worked in this present *CIC* eliminates the problems that were caused by the distinction between "merely internal" lack of consent and the lack of consent that is "also external," and between "external and public" lack of consent and the lack of consent that is "external but private." On the other hand, by removing the paragraph concerning purely internal defect and the lending of consent "internally," the Code confirms our understanding that the giving of consent that is required in simple convalidation cannot be purely interior (see commentary on c. 1158).

When one cannot prove the defect of consent, it is enough that consent be given privately and in secret (§ 2). This form of expression has the purpose of legitimizing the union in conscience, given that it is based on the supposition that nullity has not produced any impact in the external forum, since it cannot be proven. Logically, this situation deals with a convalidation in the proper sense that has no more significance than that of integrating or completing the element that was lacking, so that the marriage would be valid without the necessity of a new celebration. In that which refers to the sense and significance that must be given to giving consent "privately and in secret," see commentary on c. 1158.

If the defect of consent can be proven, it must be given according to canonical form. This requirement is maintained within the legal logic according to which if the nullity can be proven in the external forum, the convalidation must also be able to be proven externally, because a

marriage initially celebrated invalidly butthat could not be demonstrated to have been convalidated afterwards would be considered null, even if it had been convalidated privately. This situation would lead to an unresolvable conflict between the external and the internal form. However, the law established by the legislator removes this conflict, because once the marriage has been convalidated privately and in secret after the proof of nullity, one would have to conclude that the convalidation is invalid, given that it is possible to prove this in the external form; the convalidation still had been attempted by a procedure different than the one established by the law.[3]

In this case, more so than with a convalidation in the proper sense, we are dealing with the new celebration of marriage, having to apply the norms that regulate it, especially those referring to the observance of substantial juridical form. The new marriage will have to be appropriately celebrated in the ordinary form, in an extraordinary form, or in the way denominated as secret marriage or marriage of conscience.

Paragraph 3 does not mention the prescriptions of c. 1127 § 2 for mixed marriages (as is done in cc. 1158 and 1160). This does not mean that for the convalidation of marriage in the case of defect of public consent, that the ordinary lacks the power of dispensing from the form of celebration that that canon recognizes for the case of mixed marriages.[4] We have already noted that this reference to c. 1127 § 2 becomes unnecessary (see commentary on c. 1158), and that the generic remission to canonical form encompasses all of the norms referring to this one, as appropriate. It does not seem logical that an ordinary could dispense from form in the case of mixed marriages, when the law applies to any marriage whatsoever, but this power is removed when one is dealing with the convalidation of a null marriage through its new celebration, especially when, in this second situation, one is trying to legitimate a pseudo-conjugal union *(salus animarum)*.

3. Cf. J.M. GONZÁLEZ DEL VALLE, *Derecho canónico matrimonial* (Pamplona 1985), p. 129.
4. Cf. M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado* (Madrid 1987), p. 277.

1160 **Matrimonium nullum ob defectum formae, ut validum fiat, contrahi denuo debet forma canonica, salvo praescripto can. 1127 § 2.**

For a marriage which is invalid because of defect of form to become valid, it must be contracted anew in the canonical form, without prejudice to the provisions of Can. 1127 § 2.

SOURCES: c. 1137

CROSS REFERENCES: cc. 1108–1116, 1125–1127

COMMENTARY

Alberto Bernárdez Cantón

1. In the case considered in this canon—a marriage nullified by defect of form—the new celebration of marriage is required plain and simple. This is not to say, as in the previous cases, that consent must be renewed or given "in the canonical form," but rather "it must be contracted anew in the canonical form." This is not, therefore, a case of convalidation, but of a new celebration. This happens in the case in which nullity is produced only by this lack of form, as well as in the case in which it would be the result of another cause of invalidity. In this sense, Hervada is right when he affirms that a marriage nullified by defect of form cannot be the object of a simple revalidation, and if the form is required for the renewal of consent, there is no convalidation, but a new celebration.[1] This is true even though the Rotal sentence *coram* Funghini of June 30, 1988[2] dissents from that opinion. Hervada is not denying that a marriage (civil marriage—which is what this sentence refers to) nullified by defect of form might be celebrated *ex novo*; what he is denying is that this should be called convalidation. This is what is done in those countries in which canonical marriage does not produce civil effects.

Also in this case, refer to c. 1127 § 2 (the original draft referred to § 3, which was corrected in the final version [see commentary on c. 1158]), which implies that although the fulfillment of canonical form is generally required, the faculty of the bishop to dispense from this remains in the case of mixed marriages, as long as some public form of celebration is observed. Whatever its form, a new marriage must bring together all the

1. Cf. J. HERVADA, commentary on c. 1156, in *CIC Pamplona*.
2. Cf. *Il diritto ecclesiastico*, II (1989), p. 233. Also in *SRR Dec* 80 (1988), pp. 439–444.

necessary requirements for validity, and therefore, a true matrimonial consent must be given.

In effect, under the expression "defect of form" one can include: a) vitiated cases—which one might have incurred in the fulfillment of canonical form—but also b) marriages celebrated without the observance of canonical form.

a) In the cases of vitiated form, or of a defect of form, the consent of the contractants usually should not be affected by a mentality contrary to religious marriage.We are dealing in these cases with Catholics who have already contracted a canonical marriage that was invalid because of the non-competence of the assisting minister, the lack of delegation, and/or the absence of witnesses, etc. In many of these cases, the supply of jurisdiction will have taken place (cf. c. 144) and the repetition of the vows will not be necessary. A defect of form of this type is not easily discovered by the couple, unless the parties are investigating the validity of their marriage in light of their desire to introduce a cause of nullity In this case, *then, it is better to apply* by analogy that which is established in c. 1161 § 3. In these cases, as Miguelez remarks, one would have to repeat the vows because the law does not distinguish, in practice, whether a validation should take place, unless there is a situation of common error that provided for the supply of jurisdiction.[3]

b) The absence or lack of canonical form poses the problem of convalidation of civil marriage and of marriage in a non-Catholic religious form.

— There is no doubt that those who contract civil marriage, but being obliged to canonical form, must also contract canonical marriage (c. 1058). This is the practice ordered by the Church in those countries in which canonical marriage is not recognized to have civil effects. Recapitulating the present doctrine on this point, the aforementioned sentence *coram* Funghini strongly affirms that civil marriage does not exist for the Church insofar as it can be validated, as long as marital affect has been established and the consent perseveres, concluding that "it is unintelligible how a nonexistent marriage can be validated and how the same marriage cannot be convalidated.[4]" In fact, it would not be necessary to have recourse to the long argumentation that this sentence employs to arrive at the conclusion specifically maintained by canonical doctrine in practice: those who have contracted civil marriage can and must contract canonical marriage if they are obliged to this (called either convalidation or celebration).

3. Cf. L. MIGUÉLEZ, "El matrimonio," in *Comentarios al Código de Derecho canónico*, II (Madrid 1963), p. 729.
4. *Coram* FUNGHINI..., cit., p. 240.

One must take note on the other hand, that in this canonical celebration, a true matrimonial consent must be given. In general, and above all when canonical marriage is celebrated after the civil marriage, the Catholic spouse must agree to a religious marriage with the idea of expressing a perfect consent, understanding that civil marriage is a social formula that assures that their union will have the proper civil effects. And even though in the case of civil consent that might have responded to a true animus of contracting, it would have to be considered that this consent persevered in the subsequent canonical celebration. In this sense, the sentence *coram* Pompedda of May 9, 1970, dealing with canonical marriage celebrated the same day as civil marriage, said, "one must conclude that the spouses gave in front of the parish priest the same consent that previously they had expressed before the civil magistrate, or that at least the consent that was already given was virtually persevered which effected the nullity, by reason of not having observed the form.[5]"

Also, it can occur that the psychological posture of some of the contractants is placed in a distinct form: that for them, the true marriage that juridically binds may be the civil one, while the religious ritual of a canonical marriage is only window dressing. This can take place when one of the spouses is a fallen-away Catholic or a non-Catholic, who accedes to the religious celebration because of a social convention or a family duty, or by the desire to respect and please the religious sentiments of the other. This is the case in which the parties, as Abate observes, once they have contracted civil marriage and convinced of its validity, accept the renovation of consent as a pure formality to give to the same marriage a religious character.[6]

In this respect we recall a sentence *coram* Wynen of June 1, 1940, according to which it is necessary that the contractants know that the first marriage was null and that they give new consent.[7] And paraphrasing this sentence, a sentence *coram* Rogers of January 21, 1969 affirms "he who not only is ignorant of the validity of the first marriage, but proposes its validity, is totally impeded from giving new consent: If he should once again pronounce words significant of consent, he would be doing no other thing than simulating totally, or confirming an inefficacious consent. In neither of the two cases would a true marriage be generated."[8] The case resolved by the sentence *coram* Brennan of June 26, 1965 illustrates what we have been saying. This sentence considered the simulation on the part of the Lutheran wife who had acceded to canonical marriage induced by the Catholic husband, therefore, amongst other reasons, she already considered herself married by force of the previous civil marriage and only

5. Cf. *SRR Dec* 62 (1970), pp. 479–480.
6. Cf. A. ABATE, *Il matrimonio nella nuova legislazione canonica* (Milan 1985), p. 168.
7. Cf. *SRR Dec* 32 (1940), p. 432.
8. *SRR Dec* 61 (1969), pp. 64–65.

conceded that the canonical marriage had the meaning of pure rite, empty of content and without any value at all.[9]

— The hypothesis that canonical marriage should be revalidated if it serves to validate the non-Catholic religious marriage celebrated previously (which would be nullified unless there was a dispensation from canonical form according to c. 1127 § 2), should receive analogous considerations. The *CIC* prohibits another non-Catholic religious ceremony from taking place, before or after canonical celebration, in which consent is given or renewed (c. 1127 § 3). In our understanding, this norm does not directly cause the nullity of a canonical marriage. It concerns the illegality of a prohibited non-Catholic ceremony. Nevertheless it presents two risks: that of not giving true consent in handing over and accepting the conjugal rights, and that of each spouse giving consent in the ceremony of their respective confession. In effect, it can happen that the non-Catholic considers the canonical ceremony as a pure rite without any transcendence and only accepts the handing over of conjugal rights in the religious celebration of the confession that he or she professes.

As an example of a situation of this type, we refer to the case resolved by the sentence *coram* Rogers of November 8, 1962.[10] The female spouse, a profoundly convinced Anglican, did not concede the least transcendence to the canonical marriage, and only considered herself bound when she contracted Anglican marriage. She believed this to the point that marriage was not consummated until the Anglican marriage took place (the fact that the canonical marriage was celebrated previously does not alter the validity for the reasoning and application of the inverse case that we have discussed). According to said sentence, the spouse considered the canonical marriage as a pure formality that she accepted with disgust in order to please the man and the parents of the man, and she did not consider herself truly married until the celebration of marriage according to the Anglican formula took place seven days after. Because of this, the canonical marriage was declared to be null.

9. Cf. *SRR Dec* 57 (1965), pp. 369–390.
10. Cf. *SRR Dec* 54 (1962), pp. 569–576.

ART. 2
De sanatione in radice

ART. 2
Retroactive Validation

1161 **§ 1. Matrimonii irriti sanatio in radice est eiusdem, sine renovatione consensus, convalidatio, a competenti auctoritate concessa, secumferens dispensationem ab impedimento, si adsit, atque a forma canonica, si servata non fuerit, necnon retrotractionem effectuum canonicorum ad praeteritum.**

§ 2. Convalidatio fit a momento concessionis gratiae; retrotractio vero intellegitur facta ad momentum celebrationis matrimonii, nisi aliud expresse caveatur.

§ 3. Sanatio in radice ne concedatur, nisi probabile sit partes in vita coniugali perseverare velle.

§ 1. The retroactive validation of an invalid marriage is its validation without the renewal of consent, granted by the competent authority. It involves a dispensation from an impediment if there is one, and from the canonical form if it had not been observed, as well as a referral back to the past of the canonical effects.

§ 2. The validation takes place from the moment the favour is granted; the referral back, however, is understood to have been made to the moment the marriage was celebrated, unless it is otherwise expressly provided.

§ 3. A retroactive validation is not to be granted unless it is probable that the parties intend to persevere in conjugal life.

SOURCES: § 1: c. 1138 § 1
§ 2: c. 1138 § 2

CROSS REFERENCES: cc. 1057, 1073, 1078–1082, 1108–1116, 1134–1137

COMMENTARY

Alberto Bernárdez Cantón

This canon presents a concept of retroactive validation, the particularities of its efficacy, and a measure of caution regarding its procedure.

1. According to the legal text, retroactive validation can be defined concisely as that convalidation of a null marriage that is granted by the competent authority and in which, in contrast to simple convalidation, a renewal of consent is not required. Because of this, we have defined it in another place as an act of the ecclesiastical authority, which, on the basis of sufficient natural consent but limited in its efficacy by positive law, grants validity to a null marriage and removes the obstacles interposed by any impediments or lack of proper form.[1] It is called retroactive validation precisely because it is based on prior matrimonial consent, which, as we know, is the cause or root of the marriage.

Given that these obstacles consist of impediments and formal requisites, the *CIC* adds that this concession also carries with it the dispensation of impediments, if there were any, and the dispensation from form, if this was not observed.

According to the *CIC*/1917, retroactive validation also carried with it a dispensation from the law of renewal of consent (c. 1138 § 1), which is of ecclesiastical law. The current *CIC* has defined it as the grant of the authority "without the renewal of consent," so the mention of dispensation makes no sense here. Thus, it must be understood not that each concession of dispensation of the law is a renewal of consent, but rather that the current canon opens a way for convalidation in which the dispensation is not necessary.

Consequently, retroactive validation can be understood as the recognition of the validity of marriage when a true matrimonial consent exists, and the legal obstacles that impeded its efficacy have ceased, making possible its natural expansive force. We can then assert that retroactive validation does not create a bond but makes that bond possible on the basis of an existing consent at the root of an apparent marriage. The matter has been debated in canonical doctrine; it seems that if the authority on one hand removes the obstacles to validity and on the other hand concedes that the matrimonial consent should produce its effect once the legal obstacles have ceased, that the matrimonial bond is produced by force of

1. Cf. A. BERNÁRDEZ, *Compendio de Derecho matrimonial canónico* 8th ed. (Madrid 1994), p. 239.

radical consent of the parties in accord with the general principle that "*matrimonium facit consensus*" (c. 1057 § 1).[2]

Whether retroactive validation constitutes a sole act of the ecclesiastical authority or whether it consists of various acts seems irrelevant. If the obstacles to positive law already have ceased, then the object of the retroactive validation would be to concede the validity to a marriage already celebrated. If, furthermore, a dispensation from an impediment or from form is needed, it would also have as its object this dispensation.

Canonical doctrine indicates that there can be an imperfect or partial validation when not all of the elements that characterize a retroactive validation are verified. Miguelez points out the following cases: when the obligation to renew consent is imposed upon one of the contractants; when the retroactivity of all of the effects of marriage is not granted; when these effects are not seen as retroactive to the moment of celebration of marriage, but to a time after that; and when the effects of marriage only are granted without the appearance of the matrimonial bond because one of the parties has already died or fallen into amentia.[3] 2. One of the most peculiar characteristics of a retroactive validation is the retroactivity of the canonical effects of marriage to a previous time; that is, to the initial moment of the invalid celebration or to the intermediary moment between that time and the time of the validation. Paragraph 2 refers to the retroactive character of this type of validation. On this point, we must distinguish between the existence or appearance of marriage (which cannot take place without the granting of the favor) and the achievement of the retroactivity of canonical effects to the moment in which the invalid marriage was celebrated or to a later moment.

CIC/1917 contained a precise definition, not completely useless, in the sense that retroactivity of the effects was produced "by a legal fictio" (c. 1138 § 1). This fiction consists simply in presuming or imagining that the marriage would have been considered as valid from the beginning and that, because of this, it would have produced its canonical effects *ex tunc*. It is clear that one could not make retroactive the existence of the marriage itself, because as Lombardia affirms, "to speak of marriage *in facto esse* before the act of retroactive validation does not make sense."[4]

The most common doctrine saw in this point one of the most acute differences between simple convalidation and retroactive validation. In

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2. Cf. O. ROBLEDA, "Sobre el matrimonio 'in fieri,'" in *De matrimonio coniectanea* (Rome 1970), pp. 555–604; T. GARCÍA BARBERENA, "Sobre el matrimonio 'in fieri,'" in *Salmanticensis* 1 (1954), pp. 422–440; R. QUEZADA, *La perseverancia del consentimiento matrimonial en la "sanatio in radice,"* (Rome 1962), pp. 119–124; J. HERVADA, "La renovación del consentimiento matrimonial," in idem, *Vetera et Nova*, I (Pamplona 1991), pp. 744–746.

3. Cf. L. MIGUÉLEZ, "El matrimonio," in *Comentarios al Código de Derecho canónico*, II (Madrid 1963), p. 729; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, V (Rome 1925), pp. 796–797.

4. P. LOMBARDÍA, "Supuestos especiales de relación entre consentimiento y forma," in *Derecho canónico*, II (Pamplona 1974), p. 143.

this sense, one would have to say that due to the juridical condition of the children that might have been born before the convalidation (one of the most important canonical effects of marriage), that through simple convalidation, those children would acquire the condition of legitimate birth by the subsequent marriage (c. 1139), while through retroactive validation, they would have to be considered legitimate in all the effects in virtue of the proper retroactivity. Now then, if we keep in mind that the *CIC* confers the condition of legitimacy on children born of a valid and putative marriage (c. 1137), and since such a simple convalidation as retroactive validation operates upon a marital situation that in general would merit the qualification of an invalid marriage, although putative, we arrive at the conclusion that the retroactivity of the canonical effects proper to validation would have few practical repercussions. From another point of view, Gonzalez del Valle understands that the effects in the external forum are always produced *ex tunc*, while the effects in the internal forum are always produced *ex nunc*.[5]

Given that the matrimonial bond begins to exist from the convalidation, it becomes perfectly possible that if the marriage is not consummated afterwards, it can be dissolved in accord with the procedure for a non-consummated marriage. In this sense the sentence *coram* Bejan of 14 June, 1963, affirms that "since marriage only begins to exist juridically (or that is, becomes valid, and becomes a sacrament) when it is retroactively validated, the Supreme Pontiff has the power by divine right to dissolve it unless it is consummated after the retroactive validation."[6]

3. Paragraph 3 contains a practical norm regarding the granting of the retroactive validation: it must be granted only when it is a fact that the parties want to persevere in the conjugal life. This prudential measure was not contained in the *CIC*/1917, and its placement in the current Code is not perhaps the best change. The *CCEO* includes it when speaking about the requirements of a retroactive validation (c. 849 § 2).

This legal provision can be related to the extension of power to grant retroactive validation to diocesan bishops, which is no longer reserved to the Holy See (c.1141 *CIC*/1917). In effect, Wernz-Vidal said that according to the practice of the Apostolic See, retroactive validation was only granted with the condition that both parties persevered in their consent concerning the present[7] and the faculties that the sacred congregations usually gave to the ordinaries and to other pastors, imposed with regard to the retroactive validation the condition that matrimonial consent should persevere in all cases, and that there should be no danger of divorce.[8] The best way to verify these conditions is the reasonable presumption that the

5. Cf. J.M. GONZÁLEZ DEL VALLE, *Derecho canónico matrimonial* (Pamplona 1985), p. 129.
6. *SRR Dec* 55 (1963), p. 466.
7. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*..., cit., p. 806.
8. Cf. *Comentarios al Código de Derecho canónico*, IV (Madrid 1963), pp. 722 and 736.

parties are disposed to persevere in conjugal life and that this must be kept in mind by the bishop upon making the concession. On the other hand, it would be counterproductive to validate a marriage in which the conjugal consortium is about to be severed.

It is not clear whether what is decreed by this paragraph affects the liceity or the validity of the concession, especially when it is issued by an inferior authority, an aspect which is seldom discussed in canonical doctrine. As Hervada says,[9] given that what is essential for validation is perseverance and not revocation of consent, it seems that perseverance of cohabitation is only required for liceity.

9. Cf. J. HERVADA, commentary on c. 1161, in *CIC Pamplona*.

1162 **§ 1. Si in utraque vel alterutra parte deficiat consensus, matrimonium nequit sanari in radice, sive consensus ab initio defuerit, sive ab initio praestitus, postea fuerit revocatus.**

§ 2. Quod si consensus ab initio quidem defuerat, sed postea praestitus est, sanatio concedi potest a momenti praestiti consensus.

§ 1. If consent is lacking in either or both of the parties, a marriage cannot be rectified by a retroactive validation, whether consent was absent from the beginning or, though given at the beginning, was subsequently revoked.

§ 2. If the consent was indeed absent from the beginning but was subsequently given, a retroactive validation can be granted from the moment the consent was given.

SOURCES: § 1: c. 1140 § 1
§ 2: c. 1140 § 2

CROSS REFERENCES: cc. 1057, 1095–1103, 1107

COMMENTARY

Alberto Bernárdez Cantón

All of the contents of this canon are nothing more or less than an application of the general principle according to which marriage has its origin in the consent of the parties, which consent is indispensable and cannot be supplied by anyone else (c. 1057 § 1), and of the concept of retroactive validation, which is based on a consent that is inefficacious because of obstacles of positive law.

The current *CIC* expresses this requisite in a negative form; if consent is lacking, the marriage cannot be rectified by a retroactive validation. In contrast, it has omitted the positive presentation made by the *CIC*/1917: "every marriage celebrated with consent of both parties ... may be retroactively validated provided a naturally sufficient, though juridically inefficacious consent was given and continues" (c. 1139 § 1, of the *CIC*/1917).

Thus, because of the intimate nature of this institution, matrimonial consent—for both parties, of course—must be present at the time of the retroactive validation, either because it had already been given from the establishment of the marital situation, or because it was given at a later time.

1. Paragraph 1: a) refers to the first hypothesis and b) specifies the initial existence of consent that has not been revoked.

a) The existence of true matrimonial consent from the beginning has to be considered according to the intimate structure of consent, and secondly, according to the form in which it was expressed. Regarding the intimate structure, we must point out that it must respond to the unequivocal intent to establish a conjugal consortium without being affected by defects or restrictions that limit or destroy it in accord with the general norms of matrimonial consent.

The form of manifesting original consent can have an indicative value to prove to what extent the consent was authentically conjugal and, in itself, sufficient to generate the matrimonial bond.Therefore, we are not dealing with a mere union of fornication. The difficulty of proving the existence of a true conjugal consent imposed in practice the requirement that among the parties there must have taken place "some form of marriage, at least civil marriage."[1] With reference to the *CIC*/1917, Gasparri observed that a marriage that had been celebrated with some formal and extrinsic appearance of marriage is not required; it only spoke of the possibility of retroactive validation of any marriage that had begun by consent with the capacity to give rise to a marriage, provided that no impediment of ecclesiastical law existed.[2]

Marriage celebrated with canonical form presumes that the object of the consent is willing to exchange conjugal rights (c. 1101 § 1).

The celebration of marriage in a civil form does not exclude the giving over of authentic consent with a marital content. Canonical doctrine denies that the civil celebration possesses the juridic figure of marriage, but since the retroactive validation is based upon the fact that matrimonial consent has been given, the possibility exists that the ecclesiastical authority could concede on the basis of a consent manifested through civil formalities. At present, retroactive validation of civil marriages is admitted, given the amplitude with which this figure is admitted in civil law.[3] Evidently, it will be necessary that true matrimonial consent be given, even if the parties realize that it is null,[4] whereas civil marriage contracted

1. V. DEL GIUDICE, *Nozioni di diritto canonico* (Milan 1970), p. 404, note 35. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, V (Rome 1925), p. 804.
2. Cf. P. GASPARRI, *Tractatus canonicus de matrimonio*, II (Rome 1932), p. 270.
3. Cf. W. BERTRAMS, "De effectu consensus matrimonialis naturaliter validi," in *De matrimonio coniectanea* (Rome 1970), pp. 19–22; L. DEL AMO, *La eficacia del consentimiento en el matrimonio civil de los apóstata*, (Madrid 1962); sentencias *coram* STAFFA, May 18, 1951, in *SRR Dec* 43 (1951), p. 389; *coram* DI FELICI, June 8, 1954, in *SRR Dec* 46 (1954), p. 458; *coram* FIORE, June 15, 1964, in *SRR Dec* 56 (1964), p. 479; *coram* DI FELICI, June 20, 1970, in *SRR Dec* 62 (1970), p. 707; *coram* SERRANO, February 24, 1978, in *SRR Dec* 70 (1978), p. 41; *coram* FERRARO, February 24, 1981, in *Monitor Ecclesiasticus* 106 (1981), p. 311 (not published in *SRR Dec*).
4. Cf. P. GASPARRI, *Tractatus canonicus de matrimonio*..., cit., p. 270.

with the intention of fulfilling a mere formality would not be open to retroactive validation.

Still, one could consider the possibility of cohabitation of mere fact. In principle, this would be considered a union of concubinage, but there can be situations in which the true desire to live a marriage exists, especially in those regions in which a civil formalization of marriage is not required or in which the practice of a natural marriage is widespread.

b) Upon the necessity that consent should not have been revoked, it is evident that this necessity flows from the nature of retroactive validation. Revocation takes place as Ciprotti says, when one or both parties demonstrate explicitly or implicitly an act of the will contrary to the consent.[5] Regarding simple convalidation, we studied the range of diverse situations of conflict through which marriage may pass, which could imply symptoms of implicit revocation (see commentary on c. 1158). These digressions have lost great practical interest, given the criteria established by the current *CIC* coinciding on the other hand with the Curial practice of not granting a retroactive validation if the parties are not disposed to continue cohabitation (c. 1161 § 3).

2. What is foreseen in § 2 of this canon is equally a corollary of the innermost meaning of retroactive validation. In order for this retroactive validation to proceed in the case of a marriage nullified by impediment or by defect of form, the existence of marital consent is always required. But if it was lacking from the beginning, it is sufficient that it be given afterwards. At times even the renewal of consent might be required on the part of one of the spouses to assure its existence, especially in the case in which it might remain doubtful. These would be cases of imperfect retroactive validation, which is why the *CIC* advises that it be granted from the moment in which consent was given. The marriage bond in itself arises from the moment of concession (*ex nunc*); therefore, that which is conceded "from the moment the consent was given" is the retroactivity of canonical effects. Prior to that moment of consent, the marriage would be considered null by natural law (by analogy with the situation already foreseen in c. 1163 § 2).

It is advisable, lastly, to specify that this canon does not deal with retroactive convalidation of a marriage nullified by defect of consent. This canon is treating matrimonial consent as a requisite and presupposition that is very necessary so that retroactive convalidation of a marriage nulliflec by reason of an impediment or defect of form can proceed. This is the proper situation in which the retroactive validation is given. If the marriage was nullified by defect of consent exclusively, it must be convalidated according to the norms established for simple validation (c. 1159).

5. Cf. P. CIPROTTI, "De sanatione in radice," in *Apollinaris* 11 (1938), p. 290.

1163 **§ 1. Matrimonium irritum ob impedimentum vel ob defectum legitimae formae sanari potest, dummodo consensus utriusque partis perseveret.**

§ 2. Matrimonium irritum ob impedimentum iuris naturalis aut divini positivi sanari potest solummodo postquam impedimentum cessavit.

§ 1. A marriage which is invalid because of an impediment or because of defect of the legal form, can be validated retroactively, provided the consent of both parties persists.

§ 2. A marriage which is invalid because of an impediment of the natural law or of the divine positive law, can be validated retroactively only after the impediment has ceased.

SOURCES: § 1: c. 1139 § 1
§ 2: *EM* IX, 18b

CROSS REFERENCES:cc. 1073–1094, 1107, 1108–1116

COMMENTARY

Alberto Bernárdez Cantón

This canon allows us to affirm, as we have been doing, that retroactive convalidation deals with a marriage that is null because of the incompletion of some norms of ecclesiastical or positive origin *ad valorem*. Nevertheless, sometimes when dealing with an impediment of natural law or of divine positive law, the impediment will have ceased because the cause was removed.

1. Paragraph 1 is connected with the text affirmed in c. 1161 § 1, according to which a sanation carries within itself the dispensation of the impediment, if there was one, and of canonical form, if this was not observed, insisting furthermore upon the fact that consent must persevere in accordance with what is established in c. 1162. Therefore, this commentary adheres to those respective commentaries.

One must keep in mind that if the impediment has already ceased, either through the removal of the cause or through the derogation of the norm (see commentary on c. 1156), retroactive convalidation will only have as its object to give validity to the marriage, given that it is not revalidated by the cessation of the impediment.

It is important to remember that while c. 1161 § 1 speaks of "canonical form," in this canon it says "legal form." We do not have to attribute special importance to this terminological variant. Nevertheless, we can say that by virtue of the variant, not only can this marriage be retroactively validated when those who are obliged to canonical form did not observe it (this is the case of the civil marriage of Catholics) or the case where some irregularity of an invalidating nature was produced, but also the marriage of those who are not obliged to observe canonical form, but did not fulfill the prescription of civil law to which they were bound. Consequently, this phrase (*legal form*) seems to refer to both the deficiencies of canonical form as well as those of civil form when the latter should have been observed. This viewpoint is a consequence of the basic principle that the validation of marriage should be made insofar as a true matrimonial consent exists and not merely a situation of fornication.

2. Paragraph 2 contains an innovation with respect to the previous code. Canon 1139 § 2 of the *CIC*/1917 established the practical policy that the Church did not retroactively validate a marriage that is nullified by the impediment of natural law or divine law, not even from the moment in which that impediment had ceased. This practical policy does not resolve the problem of whether the Church has power to retroactively validate once the impediment has ceased because this impediment is not dispensable. Doctrine tended toward an affirmative solution in reference to this possibility.[1]

The change of policy was produced when, in the motu proprio *De Episcoporum muneribus* of June 15, 1966, the Roman Pontiff reserved to himself retroactive validation in the case of the impediment of natural or divine law that had already ceased (no. 18). In accordance with this pontifical pronouncement, the canon commented on here openly admits this possibility, although it continues the reservation in favor of the Apostolic See (c. 1165 § 2, *in fine*). Canonical doctrine interprets this validation as improper and imperfect, given that the retroactivity of the effects would only take place from the moment in which the impediment of divine or positive law had ceased (for example, a ligamen that ceases by the death of the previous spouse, or impotence that had ceased by an extraordinary remedy).

1. Cf. P. CIPROTTI, "De sanando in radice matrimonio irrito ob impedimentum iuris divini," in *Apollinaris* 12 (1939), pp. 411–423; L. BENDER, "Sanatio matrimonii invalidi ob impedimentum iuris divini," in *Ephemerides Iuris Canonici* 13 (1957), pp. 19–44; U. NAVARRETE, "Ecclesia sanat in radice matrimonia inita cum impedimento iuris divini," in *De matrimonio coniectanea* (Rome 1970), pp. 341–375.

1164 **Sanatio valide concedi potest etiam alterutra vel utraque parte inscia; ne autem concedatur nisi ob gravem causam.**

A retroactive validation may validly be granted even if one or both of the parties is unaware of it; it is not, however, to be granted except for a grave reason.

SOURCES: c. 1138 § 3

CROSS REFERENCES: cc. 60–61, 86, 87, 90, 91

COMMENTARY

Alberto Bernárdez Cantón

This canon brings together two prescriptions which, in principle, do not seem closely related. On the one hand, there is the fact that the validation can take place while one or the other or both of the interested parties are unaware. On the other hand, the canon states that validation must not be granted without a grave cause.

1. In *CIC*/1917, this reference was the object of consideration in the introductory canon of the institute. "The dispensation from the law of renewal of consent can be conceded even if one party is ignorant as well as if both parties are unaware" (c. 1138 § 3). The new text of this precept is in accordance with the current concept of retroactive validation, where it is not now presented as a dispensation of the law of renewal of consent, but as a figure of convalidation in which a dispensation is not necessary.

The concession, even though one of the parties is ignorant, can take place when one party does not ask for a retroactive validation or for a renewal of consent, because, for example, of his or her anti-religious ideas, orwhen there is fear that if one party is informed of the nullity, the other would revoke his or her consent, or would claim the marriage was null.

When both parties are ignorant, retroactive validation is accomplished when the pastor or the bishop, knowing about the nullity of the marriage, judges it opportune to effectuate the validation without notification of the parties because of danger that the parties would revoke their consent. Retroactive validations are also granted while the parties remain unaware when revalidation was granted to a group of marriages that were null, especially because of the lack of competence of the assisting minister.

On the other hand, even though retroactive validation can be granted even if the interested parties do not know or ask for it, it is not granted against the will of both, as is stated in c. 1161 § 3.

2. In the traditional doctrine, the requirement of a just cause was technically connected with the necessity of its existence in the giving of dispensations, since retroactive validation as we have been observing was considered as a dispensation from the law of renewal of consent. Because this formal connotation has disappeared, it is sufficient that retroactive validation be an extraordinary way to bring about the matrimonial bond, as well as an extraordinary form of validation that only proceeds when simple convalidation would not be viable.

The *CIC* has made this requirement explicit regarding the concession made in the case of ignorance of one or both of the parties. Curiously, the *CCEO* has expressed it in another context: "A retroactive validation is not to be granted except for a grave reason and unless the parties intend to persevere in conjugal life" (c. 849 § 2).

By this, we would have to interpret that the requirement of just cause refers to all retroactive validations, and not only in the case in which one or both of the parties is ignorant. It is understandable also that when an action is taken without the knowledge of one or both of the pseudo-spouses, a cause that justifies this action must exist.

In general, when retroactive validation is the only form (given that this is an extraordinary remedy of convalidation) of bringing about the marriage bond between the apparently married, a sufficient cause would be the convenience of juridical and morally legalizing the situation of those who are thus united, along with the legitimization of children.

The grave causes most frequently proposed by the canonical authors[1] include the following: when, upon notifying one of the parties of nullity of marriage and inviting him or her to renew consent, there is fear that he or she might request a declaration of nullity; when it is not possible to reveal the nullity of marriage without uncovering one's own infamy; when one of the pseudo-spouses is non-Catholic or an unbeliever and would refuse to perform any act before the ecclesiastical authority; or when the assistant minister discovers the nullity of marriage by a defect of competence, but it is not easy to lead the parties to give consent.

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, V (Rome 1925), p. 809; F.M. CAPELLO, *Tractatus canonico-moralis de Sacramentis*, V (Turin-Rome 1950), p. 863; TH.M. VLAMING-L. BENDER, *Praelectiones iuris matrimonii* (Bussum (Netherlands) 1950), p. 535.

1165 **§ 1. Sanatio in radice concedi potest ab Apostolica Sede.**

§ 2. Concedi potest ab Episcopo dioecesano in singulis casibus, etiam si plures nullitatis rationes in eodem matrimonio concurrant, impletis condicionibus, de quibus in can. 1125, pro sanatione matrimonii mixti; concedi autem ab eodem nequit, si adsit impedimentum cuius dispensatio Sedi Apostolicae reservatur ad normam can. *1078* § 2, aut agatur de impedimento iuris naturalis aut divini positivi quod iam cessavit.

§ 1. Retroactive validation can be granted by the Apostolic See.

§ 2. It can be granted by the diocesan Bishop in individual cases, even if a number of reasons for nullity occur together in the same marriage, assuming that for a retroactive validation of a mixed marriage the conditions of Can. 1125 will have been fulfilled. It cannot, however, be granted by him if there is an impediment whose dispensation is reserved to the Apostolic See in accordance with Can. 1078 § 2 or if there is question of an impediment of the natural law or of the divine positive law which has now ceased.

SOURCES: § 1: c. 1141; SCDS Resp., 10 mar. 1937
§ 2: *PM* 21, 22; *EM* IX, 18a et b

CROSS REFERENCES: cc. 134, 137, 361, 1078–1080, 1084, 1085, 1125–1127

COMMENTARY

Alberto Bernárdez Cantón

In treating the competent authority to grant a retroactive validation, we will make reference to the power of the Apostolic See, the power of the diocesan bishop, and the cases reserved to the Apostolic See.

1. Following the precedent of post-conciliar legislation, the *CIC* breaks with the norm of the Code that established: "Retroactive validation can only be granted by the Apostolic See" (c. 1141 *CIC*/1917). Because of this clause, § 1 limits itself to affirming that it "can be granted by the Apostolic See." This change is a logical one, given that the amplification of faculties in favor of bishops is not to be to the detriment of those of the Holy See. The *CCEO*, following its simplifification technique in the revision of norms, omits this express reference to the power of the Holy See (c. 852), perhaps because it considers it unnecessary or it understands it to be

already sufficiently alluded to, since it gathers together the cases reserved to the Apostolic See.

2. Paragraph 2 deals with the faculty of the diocesan bishop to grant a retroactive validation. The origin of this clause is in the post-conciliar law that regulated this faculty for some concrete cases (*PM* 21–22), and which established the laws that remained reserved to the Holy See (*EM* 18).In this last disposition, the following was reserved to the Holy See: "dispensation of the law of renewing consent for the purpose of retroactive validation when: a) a dispensation of an impediment reserved to the Apostolic See is required; b) one was dealing with an impediment of natural or divine law which has ceased; c) one is dealing with mixed religion marriages and the prescribed conditions were not observed ..."

The commentary on § 2 deserves the following observations:

a) The power of retroactive validation corresponds to the diocesan bishop and not to other authorities that enjoy the title of local ordinary. Because of this, the vicar general and the episcopal vicar are excluded (c. 134 § 3). The fact that this power has to be exercised on a case-by-case basis raises some difficulty in admitting that this power should be delegated according to the tenor of c. 137 § 3. Nonetheless, Pinero understands that the formula "in individual cases" does not take away the faculty of delegation, but instead that the delegate should use it in each case; this formula signifies that a delegation for a retroactive validation cannot be given.[1]

b) In delegating the power of the diocesan bishop to retroactively validate individual cases, it must be understood that the bishop is not competent in a plurality of cases in a generic or indefinite way, even though he would be able to exercise power in various concrete and determined cases. This type of generic or indefinite retroactive validation can take place on occasions in which matrimonial nullity is produced by local circumstances that affect a large number of persons. Examples of general retroactive validation include: the grant by Julius III to England in 1554 to facilitate its return to the Catholic church; the granted by Clement VIII in 1595 for marriages contracted by Greeks with the impediment of consanguinity in the fourth grade; the authorization by Pius VII in 1809 for civil marriages contracted during the French Revolution; and the order of Pius X declaring valid the marriages contracted in Germany before April 15, 1906.[2]

c) This power is also operative when, in a single marriage, various causes of nullity come together and when these causes are able to be

1. Cf. J.M. PIÑERO, *La Ley de la Iglesia,* II (Madrid 1986), p. 264; M. LÓPEZ ALARCÓN-R. NAVARRO VALLS, *Curso de Derecho matrimonial canónico y concordado* (Madrid 1987), p. 281.

2. Cf. L. BENDER, "Convalidation du mariage," in *Dictionnaire de Droit canonique,* IV (Paris 1949), col. 549; A. KNECHT, *Derecho matrimonial católico* (Madrid 1932), p. 591; J. BANK, *Connubia canonica* (Rome 1959), p. 571.

retroactively validated with the power that the diocesan bishop can dispense.

d) When one is dealing with the retroactive validation of a mixed marriage, the conditions of c. 1125 must be fulfilled. This prescription brings up two questions: 1) When the mixed marriage became invalid due to a reason other than the religious difference of the contractants (that is to say, for a cause distinct from the impediment of disparity of cult), and when, in the moment of celebration, the appropriate promises had already been given—above all if they had been fulfilled satisfactorily—it seems that there would be no reason to require them again. 2) The verification of these promises would make impossible the application of what is foreseen in c. 1164, that is to say, that one can senate a marriage in the ignorance of one or both parties.

e) Even though the power of the diocesan bishop is affirmed when "a number of reasons for nullity" come together in the same marriage, it is not said expressly that there can be a retroactive validation when the marriage was nullified because of defect of form. According to the response of the CPI of July 5, 1985, "Diocesan Bishops cannot dispense from canonical form in the marriage of two Catholics except in the case of danger of death."[3] It would be very strange if bishops could not dispense from form before the celebration of marriage and could do so afterwards, for the purposes of retroactive validation. The question remains complicated when examining the *CCEO* on this point. It establishes that "the Patriarch and the Eparchial Bishop can grant retroactive validation in individual cases if a defect of form of celebration prevents the validity of marriage prescribed by law ..." (c. 852). It is true that in the Eastern discipline, the Patriarch can dispense from form if the reservation of this right is shared by him with the Apostolic See (c. 835). It is different in the case of the Eparchial bishop, who enjoys this faculty in the case of validation, exactly what is not expressly given in the *CIC* in relation to the diocesan bishop. Although one cannot easily understand the reason for establishing this differentiation between one and the other authority, one would have to conclude that the diocesan bishop lacks this faculty since he is not recognized expressly as the Eparchial bishop is recognized.

3. In addition to the reservations already pointed out in favor of the Holy See (general retroactive validations and the *dispensation* of the form), § 2 establishes the following reservations: a) when an impediment exists whose dispensation is reserved to the Apostolic See in conformity with c. 1078 § 2; b) when one is dealing with an impediment of natural or divine positive law that might have already ceased.

3. *AAS* 77 (1985), p. 771.

a) When dealing with the first clause, the problem arises of whether the extraordinary faculty that is given to the diocesan bishop to dispense from some reserved impediments in the case of danger of death (c. 1079 § 1)—and in the so called perplexing or unforeseen case (c. 1080 § 1)—is applicable in the case of retroactive validation. In the case of danger of death, no difficulty exists, given that if the diocesan bishop can grant retroactive validation, and in this concrete case he has the faculty to dispense from reserved impediments—notice that this also of canonical form—then logically, he can exercise both faculties simultaneously. A very similar reasoning can be made concerning the case of perplexity even if it is very difficult to imagine that situation of having to grant retroactive validation in confusing or unforeseen circumstances that occur in reality. In any case, c. 1080 § 2, regulates a case very similar to that of § 1 "when there is the same danger in delay and there is no time to have recourse to the Apostolic See," and then it says that "this power applies also to the convalidation of marriage." The only difficulty would be if the term *convalidation* alludes to simple convalidation or also to retroactive validation. One must understand that this term has to be interpreted in its integral sense since the *CIC* in the chapter that we have been commenting on (*De Convalidatione matrimonii*), includes the two institutes to which the article is dedicated.

b) Once the present discipline overcame the ancient practical requirement that one would not senate a marriage contracted invalidly because of an impediment of divine law, and admitting convalidation when this impediment had ceased, it is clear, by the removal of the cause, that the reservation of the retroactive validation in these cases in favor of the Apostolic See is established. The practical cases would be reduced to the impediment of ligamen (which ceases through the death of the former spouse by non-consummation or in favor of the faith) and to the impediment of impotence (which could be removed by an extraordinary remedy).

One can ask the opposite question, then, about the possibility of retroactively validating an invalid marriage when, after the celebration, an indispensable impediment, (i.e., of divine law) should arise. With regard to the presence of the impediment of ligamen, one would have to deem that the celebration of a second marriage, even if it is dissolved afterwards, supposes the revocation of consent given in the first marriage, which became invalid, and whose revocation would make the retroactive validation impossible. Only if another pseudo-matrimonial situation appeared after the dissolution of this second marriage would this one be able to be retroactively validated, but not in the original situation. With regard to impotence that is overcome after some time of marital life, and where possibly children had been born before the impotence arose, the possibility of a retroactive validation has been debated, keeping in mind that the marriage was celebrated without this impediment and with the pretext of some pontifical rescript that supposedly would have acceded to this

concession.[4] Independently of the fact that in such a case one could concede the retroactivity of the canonical effects of marriage (it would be imperfect validation or simply the legitimization of children by rescript according to c. 1139), it seems clear that the bond as such cannot arise in the moment of the concession of the favor—when it arises in the case of convalidations—because the existence of the same indispensable impediment opposes it.

4. Cf. E. FERNÁNDEZ REGATILLO, *Derecho matrimonial eclesiástico* (Santander 1965), pp. 362–366.

PARS II
De celeris actibus cultus divini

Part II
The Other Acts of Divine Worship

INTRODUCTION

José Antonio Abad

The title of sacramentals includes only three classes of sacramentals: blessings, consecrations (cc. 1169 §1, 1171) and exorcisms in the strict sense (c. 1172; see the introduction to this part II of book IV).

The four general canons about sacramentals refer to the *Sacrosanctum Concilium* doctrine, which specifies 1) their nature and purpose (*SC* 60), 2) their relationship with the Paschal mystery (*SC* 61), 3) their pastoral value (*SC* 61) and the need to reform them (*SC* 62), as well as 4) the criteria to carry out such reform (*SC* 63, 79).

1. With respect to the nature of sacramentals, the *CIC* assumes the definitional elements specified in *Sacrosanctum Concilium* 60, which underlines the following points:

— they are sacred signs;

— they have a sacrament-like structure;

— they have been created by the Church;

— they produce spiritual and material fruits;

— and their efficacy originates from the intercession of the Church.

This is a richer notion than that of *CIC*/1917, which defined sacramentals as "res aut actiones quibus Ecclesia, in aliquam Sacramentorum imitationem, uti solet ad obtinendos ex sua impetratione effectus praesertim spirituales" (c. 1144). The greatest difference resides in the *CIC* having linked sacramentals to sacraments: like them, sacramental are *sacred signs*, and they produce supernatural effects, even though their efficacy is not *ex opere operato* but *ex opere operantis Ecclesiae.*

This peculiarity turns sacramentals into both *sanctifying* and *worshiping* actions, which not only presuppose faith, but also, by words and objects, nourish, strengthen, and express it. By celebrating the faith, sacramentals dispose the faithful to receive the fruit of grace, worship God, and practice charity.

Such orientation of sacramentals to sacraments relates sacramentals inherently to the celebration of sacraments, especially to the Eucharist, which is the core and apex of the whole sacramental body. And this is so in a dual sense: as preparation and as extension, in as much as some graces are placed at the service of the people in order to facilitate the fulfillment of Christ's mystery on earth and to keep them from going astray on their pilgrimage to heaven. As is the case with every saving act, sacramentals tend to increase and enhance the kingdom of God.

As indicated in the first canon of this title, sacramentals are sacred signs by which, somewhat after the fashion of the sacraments, effects are signified and obtained, especially spiritual ones. Let us examine the most noticeable differences they have from the sacraments. Sacraments are tangible signs that produce the grace signified by them. In the first place, sacraments are of divine institution, while sacramentals are of ecclesiastical institution. Since it is Christ himself who brings efficacy into operation, although in a mediated way and using his Church, this does not presuppose any obstacle, because the entire liturgy, and thus sacramentals too, are the ways by which Christ brings salvation to all souls; nevertheless, in the case of sacraments this intervention is immediate, and all the Church does is to guard them and administer them to men. In the case of sacramentals, however, this intervention takes place through the Church, specifically through the hierarchy (although in some cases lay administration is permitted).

Another difference, which follows from the first, is one that emerges according to the manner in which they produce their effects. When sacraments are established and administered validly, they produce their effects, principally the sacramental grace, *ex opere operato*, that is, without the influence of the moral dispositions of a minister or even of the receiving subject (although this must be qualified, since on occasion the subject is required to possess certain dispositions for the sacrament to be valid in itself or for it to impart a greater intensity to the sacramental grace). Insofar as sacramentals are concerned, we must differentiate between *ex opere operantis Ecclesiae* and *ex opere operantis* by the minister or subject. The effects obtained by *ex opere operantis Ecclesiae* include the very intercessory prayers of the Church in all sacramental matters and the acceptance by God of the objects and persons that receive constitutive consecration or blessing, as being reserved to its exclusive use. The *ex opere operantis* effects by the minister or subject refer to the fact that God grants His gifts in such quantity or quality as is determined by virtue of the merit and dispositions concurring in the person who administers,

confers, or receives them. It may therefore be said that sacramentals will perform *quasi ex opere operato.* According to Regatillo, "Sacramenta operantur ex opere operato, independenter a dispositione ministri, quia merita Christi ibi operantur, et Christus est minister principalis; sacramentalia quasi ex opere operato, ex impetratione Ecclesiae; ipsa est principalis ministra, minister ea nomine Ecclesiae ministrat."[1]

Perhaps the most significant difference is the one pertaining to the effects themselves; while it is true that both are sacred signs, in the case of sacraments, if they are established and administered validly, they will produce a sanctifying and sacramental grace and, in some sacraments, they will produce character; while in the case of sacramentals, their most proper effect is to grant actual grace, provided also that the persons have the dispositions and moral dignity that dispose them to receive the sacraments fruitfully and in order to sanctify all the temporal realities. In this regard, André and Condis say that "sacramentals do not have the natural power to produce the grace, but only to obtain it from God's mercy and kindness. This is why sacramentals are visible rites instituted by the Church which have the power to signify and obtain grace."[2] In this sense, it can be said that, while sacraments are in one way or another necessary for salvation and sanctification, sacramentals are just powerful aids by which the believer receives from God's love protection against the devil's temptations. These are graces and aids that are consistent with everyone's specificity, operating ability, and actual grace to fulfill the divine will, in keeping with everyone's own vocation and charisma.

In any case, despite the dictum that "for the well-disposed members of the faithful, they sanctify the various circumstances of life." (*SC* 61), the presence of a sacramental is not strictly necessary for earthly realities and life events to be sanctified.

One last difference to be noted is that the sacraments are only seven, while sacramentals can be as many as may be required by people in their historical evolution; they can be said to be an ecclessial response to people's existential situations among themselves and vis-à-vis the cosmos, which accounts for their variety in the course of history.

1. E. FERNANDEZ REGATILLO, *Ius Sacramentarium* (Santander 1949), p. 904.
2. *Dictionnaire de Droit Canonique*, III, p. 401.

TITULUS I
De sacramentalibus

TITLE I
Sacramentals

1166 **Sacramentalia sunt signa sacra, quibus, ad aliquam sacramentorum imitationem, effectus praesertim spirituales significantur et ex Ecclesiae impetratione obtinentur.**

Sacramentals are sacred signs by which, somewhat after the fashion of the sacraments, effects, especially spiritual ones, are signified and are obtained through the intercession of the Church.

SOURCES: c. 1144; *SC* 60

CROSS REFERENCES: c. 834 § 1

COMMENTARY

María del Mar Martín

1. This canon gives a definition of sacramentals that is technically more refined than that of the *CIC*/1917. Actually, what *CIC*/1917 offered was a classification of sacramentals, defining them as "things or actions ..."; however, when c. 1166 indicates—reflecting the magisterium of the Second Vatican Council (*SC* 61)—that sacramentals are "sacred signs," it is making a reference proper to their ontological nature and, in this sense, it may be said to supersede the previous definition.

However succinct it may be, it would be helpful to explain the theology of signs, and more specifically, about their value in the liturgy and in the sacramentals. I will do so by offering illuminating quotes from Vagaggini: "...we know that not only was the Mosaic law based in a large number of rites, 'sacramenta', but also on natural religions themselves, both before and after Mosaic law, there were rites that can be called in their own way 'sacramenta'and they served and still serve God in saving

people"[1]; and the other quote: "God does nothing but to treat man according to style of human beings, as is naturally demanded by the very nature of the human person, which is a substantial unity of body and soul, of spirituality and materiality; the spiritual soul knows and by the same token it is perfected through the body and sensible things, and, at the same time, it is perfected and manifested in the body and in sensible things, by leaving an imprint of a part of itself on them. The incarnate way and the regime of signs is best suited for such nature, an incarnate spirit."[2]

On the other hand, reference needs to be made to the most important moments in which the concept of sacramentals has been deepened throughout history. In ancient times, non-Christian religions called *mystery* or *sacrament—mysterion* for the Greek and *sacramentum* for the Latin—all those things that would link or relate mortals with divinity and which had a certain secret or hidden nature. This concept was embraced by Christianity and, at first, was given an exceptionally broad definition: *sacrament* was everything that would in one way or another enter into the divine plan for salvation and had a hidden meaning and a transcendent virtue. It was only later that theologians began to distinguish sacraments and sacramentals conceptually from another series of rites and prayers making up the liturgy. A first step toward that knowledge and distinction was the one taken by Saint Augustine when he applied the concept of *sign* to the notion of *sacramentum-mysterion*, that is, a sensible thing that reminds us of what it stands in lieu of; thus, within the idea of *sacramentum-mysterion* comprising all things sacred, the strictest concept of sacred signs that stand for spiritual realities could be distinguished. However, since the concept of a sacred sign could be predicated both on the sacraments and sacramentals, these two categories were not originally distinguished, and for centuries they were both called sacraments. In reality, though, while there are similarities between them, they are clearly different. However, while it should be clarified that the Church recognized, confected, and administered the seven current sacraments as instituted by Christ from the very first moment, the fact that it took centuries for the theologians to arrive at a concept that would gather those seven sacraments and distinguish them from other more or less similar realities is a different story.

A definitive step in this direction was taken by Peter Lombardo (+1160) in the twelfth century[3] and by the author of *Summa Sententiarum* when he applied the scholastic concept of efficient cause to that of sensible sign, and thereby completed the definition handed down by Saint Augustine. Thus, sacraments were the sensible, effective signs of grace that

1. C. VAGAGGINI, *El sentido teológico de la liturgia* (Madrid 1965), p. 69.
2. Ibid., pp. 69–70.
3. A. PIOLANTE (ed.), *I Sacramenti* (Vatican City 1959), p. 299.

he managed to distinguish from sacramentals, which were sometimes referred to as *minor sacraments*.

2. This resemblance borne by sacramentals with regards to sacraments is also indicated in the canon by the term of "imitation": "sacramentals are sacred signs ... in a certain way, an imitation of sacraments." The scope of that imitation is—subject to the ontological nature—indeed a broad one. As has been shown by the doctrine,[4] they resemble each other in that:

— they are sensible signs, often with matter and form; that is, in accordance with Saint Thomas Aquinas' traditional doctrine, they consist of the words that should be employed by the minister in the act of administering the sacramental (such is the form), and the sensible things (by reason of the matter) through which it is brought about;

— they are public means of sanctification offered by the Church for the sanctification of the faithful, and even of those who are not yet faithful, such as catechumens;

— they are intended to produce "mainly spiritual" effects. In some cases those effects can also be material, such as healings, a bumper crop, etc., provided that they conform to God's will and are always for the sake of the salvation and santification of souls. The spiritual effects—which are more proper to sacramentals—are actual graces to exercise the acts of virtue, especially in so far as the infused theological virtues of faith, hope, and charity are concerned, to forgive venial sins, to prepare people for the sacraments, and to protect against devils through exorcisms or also by way of blessings, etc.;

— their confection and administration belong to the public worship of the Church (*SC* 26); hence canon law takes care to regulate some of these aspects of sacramentals;

— and, finally, their efficacy flows from the Passion, Death and Resurrection of Christ (see introduction to this title).

3. In the previous section, mention was made of the reason—which is implicit in the canon—for the legislator to want to regulate with canonical norms certain aspects of the discipline of sacramentals, despite the existence of liturgical books in which those aspects have been thoroughly regulated.

"The intercession of the Church" imparts a markedly public character to sacramentals (*SC* 26), the ordering and protection of which pertain primarily to a canonical system (c. 838). In effect, as Vagaggini rightly points out, "the road for us to go to God has been imposed on us by God himself and has been freely chosen by Him in its particular features. Now, this is not only a christological-trinitarian path, but also a social, commu-

4. Cf. J.T. MARTÍN DE AGAR, commentary on c. 1166, in *Pamplona Com.*

nity, ecclesial, hierarchical and accordingly a liturgical path."[5] Such social and hierarchical character is represented by the mediation of the Church, all of it penetrated by God's mercy for Him to render effective the sacramental word and action. Ultimately, the administration of sacramentals on behalf of the Church presupposes that it determine in which persons it sees itself represented (the rightful ministers) and the words and actions (sacramentals) by which it makes intercession (cc. 834 and 1167).

5. C. VAGAGGINI, *El sentido teológico...*, cit., p. 69.

1167 § 1. **Nova sacramentalia constituere aut recepta authentice interpretari, ex eis aliqua abolere aut mutare, sola potest Sedes Apostolica.**

§ 2. **In sacramentalibus conficiendis seu administrandis accurate serventur ritus et formulae ab Ecclesiae auctoritate probata.**

§ 1. Only the Apostolic See can establish new sacramentals, or authentically interpret, suppress or change existing ones.

§ 2. The rites and the formulae approved by ecclesiastical authority are to be accurately observed when celebrating or administering sacramentals.

SOURCES: § 1: c. 1145; *SC* 63, 79

CROSS REFERENCES: cc. 10, 331, 838 § 4, 1166, 1168–1169

COMMENTARY

María del Mar Martín

1. As is the case with *CIC*/1917 (cf. c. 1145), the *CIC* specified that it is of the exclusive competence of the Apostolic See to establish new sacramentals and suppress, change, or authentically interpret existing ones. The principle is a consequence of the doctrine presented in the previous canon, where mention was made of the implicational and binding character that sacramentals had for the entire Church, since the mainly spiritual effects of sacramentals are obtained by its intercession (c.1166). It is therefore reasonable for the ecclesiastical authority to regulate matters pertaining to the substance of sacramentals and all other aspects specified in the canon.

The specific election of the ecclesiastical authority that is competent is determined by the universal legislator. It seems also logical—but not only for reasons of unity concerning this subject—that competence should fall upon the Apostolic See. In view of the fact that actions and things only can become of sacramentals to the extent that the Church deems it desirable and links its intercession to them[1], the authority having the supreme and immediate power in the Church (c.331) would be the most suitable to exercise that competence. However, as was the case prescribed for the

1. Cf. J.T. MARTÍN DE AGAR, commentary on c. 167, in *Pamplona Com.*

liturgy in *Sacrosanctum Concilium* 22, this does not mean that both the bishops and the bishops' conferences may not also have competence regarding diverse celebrational or other aspects of sacramentals.

Under this canon, the subjects reserved for the Apostolic See are specifically as follows:

— establish new sacramentals;

— suppress or change some of them;

— and authentically interpret existing ones.

Even though the provisional scope of the canon is broad, Vatican II has already indicated areas that fall within the competence of the bishops' conferences or of diocesan bishops. Thus, *Sacrosanctum Concilium* actually indicated that it is incumbent upon the bishops' conferences to carry out the task of adapting the liturgical books with respect to the administration of sacraments and sacramentals (*SC* 39). On its part, the *CIC*, echoing the conciliar teachings (*SC* 41–46), underscores the power of the diocesan bishop to set mandatory standards in liturgical matters, within his diocese and on those things entrusted to him (c.838 § 4); but, above all, he is entrusted with a certain broad competence in the oversight and promotion of universal laws for liturgical arrangements, including the subject under consideration, namely, sacramentals.[2]

2. The competence of the Apostolic See with respect to the ability to establish new sacramentals or suppress existing ones shows their ecclesiastical institution, and consequently indicates that their number can be varied—new sacramentals can also be added as required (*SC* 79).

Many of the existing sacramentals are totally independent from sacraments, while others are closely interrelated with them as a preparation of the matter or the subject, or also in fulfillment of the sacrament itself.

In times past, but still within this century, the doctrine listed six categories of sacramentals: *orans* (Our Father, etc.); *tinctus* (such as holy water); *edens* (holy bread); *confessus* (confiteor); *dans* (alms); *benedicens* (blessing). This is how, for example, Santamaría Peña records it.[3]

Sacramentals were usually divided into *transient* sacramentals—which are the ceremonies underlying the entire objective entity of sacramentals—and in the opposing case, *permanent* sacramentals (such as holy water). The *transient* sacramentals corresponded to sensitive actions, while the *permanent* sacramentals were things. However, it was also stated precisely that there were actions (e.g. the blessings) that were transient by their nature, but produced a permanent effect.[4]

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2. Cf. J.M. DÍAZ MORENO, "El derecho 'litúrgico' diocesano postcodicial" in *Derecho particular de la Iglesia en España. Experiencias de la aplicación del nuevo Código* (Salamanca 1986), p. 154.

3. Cf. F. SANTAMARÍA PEÑA, *Comentarios al Código Canónico* (Madrid 1921), p. 384.

4. Cf. S. ALONSO, commentary on c. 1144, in *Código de Derecho Canónico*, 9th ed. (Madrid 1974).

Currently, we can establish four types of sacramentals (we are referring here only to those that are independent from sacraments):

— *invocatory blessings*: these are ceremonies or formulae used to request divine assistance for those who use blessed objects or receive the blessing;

— *constitutive blessings*: these are the ceremonies by which a profane object becomes in a way a sacred one, but without the use of holy oils;

— *consecrations*: these are ceremonies by which something profane becomes sacred in a deeper manner, by using holy oils. Although there are a few exceptions when they refer to places, they are called *dedications* and when they refer to persons they are called *consecrations*.

— *exorcisms*: in which "the Church asks publicly and authoritatively in the name of Jesus Christ that a person or object be protected against the power of the Evil One and withdrawn from his dominion" (CCE, 1673).

3. The *CIC*/1917 (c.1148) prescribed the invalidity of consecrations and blessings if the formula specified by the Church was not used. However, as far as the administration of a sacramental is concerned, all it stated was that the approved rites must be observed.

The former is the criterion that has remained in § 2 of the canon; this criterion is applied to both the rites that must be used in the confection or administration of sacramentals and the formulae that are to be used; the norm establishes in a compulsory way that they both be diligently observed. Thus, the express clause of invalidity on the grounds of failure to observe the formulae prescribed by the Church has disappeared from the canon; consequently, by virtue of c. 10, neither the lack of diligence in the application of rites nor the failure to comply with the formulae would in principle appear to result in the invalidity of the sacramentals; however, they will be illicit.

This interpretation of § 2 of the canon poses many questions, if we compare it with the practice of confection and administration of various sacramentals. Let us broach some issues relating to what has been prescribed by the canon.

The first issue relates to the fact that since there is a variety of sacramentals, failure to perform a rite and formula in the blessing of a rosary does not seem to have the same scope, for instance, as the nonobservance of an abbot's blessing. And it could even be added that there may be varying degrees of nonobservance, which range from the one that relies on a misunderstood spontaneity up to the formal disregard for the provisions established by the ecclesiastical authority; juridically speaking, such attitudes do not seem to have the same solution.

On the other hand, as is the case with sacraments, it must also be taken into account that, if constitutive elements are missing, the substance of the sacramental is not eventually confected, that is, it was just

the semblance of a sacramental, which is actually not invalid, but nonexistent.

Lastly, all changes affecting the established rites and formulae in this field are in fact a *modification*of the sacramental, which, according to § 1 of the canon, is incumbent upon the Apostolic See.

These considerations, prompted by the drafting of § 2 of c. 1167, underscore the complexity of the issue; at the same time they show that a more integrated norm in harmony with the ontology and practice of sacramentals would have been more desirable.

In our opinion, the criterion to be followed in this matter should be this: there is illegality in the confection and administration of sacramentals when the rites approved by the competent ecclesiastical authority are not diligently observed. There is invalidity when the substance of the sacramental has not been observed, that is, when any of the essential constitutive elements (in matter or form) is missing for sacramental growth.

As will be seen in the canons following this one, the invalidity may originate from the minister that confects or administers a given sacramental (see commentary on cc. 1168–1169).

4. It is appropriate to comment on one last point in relation to c.1167. Putting aside the issue of invalidity, the point refers to two questions regarding the diligent use of rites and formulae in the administration or confection of sacramentals:

a) The provision of c. 1167 does not imply that rites and formulae should be uniform for the entire Church or invariable over time.[5] Vatican II encouraged rather the opposite, that is, "not to impose a rigid uniformity on matters that do not affect faith or the good of the entire community" (*SC* 37); and, once the substantive unity is saved, "legitimate variations and adaptations to different groups, regions and peoples" (*SC* 38) are admitted. With the approval of the Apostolic See, this rich plurality is introduced to the adaptation of the various rituals proper to each region.

b) Together with such legitimate variety encouraged by the Council, the diligent fulfillment of what has been prescribed is to be observed (c. 1167 § 2) in such a way that unity vis-à-vis "as far as possible, notable differences between the rites used in adjacent regions must be carefully avoided" (*SC* 23), and the proper observance of the confection and administration norms already approved by the ecclesiastical authority is preserved. As has already been indicated in the first section of this commentary, the obligation to oversee and promote all matters pertaining to this domain rests with the diocesan authority.

5. Cf. J.T. MARTÍN DE AGAR, commentary on c. 1167..., cit.

1168 **Sacramentalium minister est clericus debita potestate instructus; quaedam sacramentalia, ad normam librorum liturgicorum, de iudicio loci Ordinarii, a laicis quoque, congruis qualitatibus praeditis, administrari possunt.**

The minister of the sacramentals is a cleric who has the requisite power. In accordance with the liturgical books and subject to the judgement of the local Ordinary, certain sacramentals can also be administered by lay people who possess the appropriate qualities.

SOURCES: SCCouncil Facul., 18 oct. 1927; *SC* 79; *LG* 29; *SDO* 22; OEx 19; RCIA 48, 66

CROSS REFERENCES: cc. 1166, 1167, 1169, 1172

COMMENTARY

María del Mar Martín

1. This canon refers to the minister of sacramentals in general; in the canons following this one, the legislator sets norms on who can administer or confect certain sacramentals (cc. 1169: consecrations, dedications and blessings, and 1172: exorcisms).

It should be noted that this whole subject belongs properly to ecclesiastical law, not divine law (c.1166), and that the Apostolic See is competent in this matter (c.1167), in which it may dispose at each time and for each sacramental the manner best suited to the good of the faithful and the Church (*SC* 21).

The requirements for being a minister of sacramentals are two: a) having received the sacrament of orders; and b) having been invested with the requisite power.

With regards to the first one—being a cleric—no indication is given about the grade of the sacrament of orders that should be possessed; it is therefore understood that the ministers are deacons, presbyters, and bishops. Being a cleric was also a requirement prescribed by c.1146 of *CIC*/1917 to be a minister of sacramentals. But one must take into account that being a cleric means different things in each code. For *CIC*/1917, and before the 1972 reform by Paul VI (mp *Ministeria quaedam*), belonging to the clergy began with the tonsure; at present, the beginning of the clerical state is given by the reception of the diaconate.

However, for the *CIC*, it is not enough to have received one of the grades of the sacrament of orders in order , to be a minister; it is also necessary—as was also prescribed at the *CIC*/1917—to have the requisite power. This means that such power referred to in the canon is a juridical power granted by the law, to be exercised in the administration or confection of all or some sacramentals. This power is determined by c. 1169, which relates it to the various grades of the sacrament of orders.

2. The *CIC* recognizes in this canon the possibility that lay people—men and women—may also be ministers of certain sacramentals. The norm uses virtually the same words employed by Vatican II: "provision should be made for the administration of some sacramentals, at least in special circumstances and at the discretion of the ordinary, by qualified lay persons" (*SC* 79).

The canon specifies the following requirements for lay people: to adhere to the provisions established in the liturgical books, to follow the judgement of the ordinary, and to possess the appropriate qualities. These requirements presuppose that:

— not all lay people are ministers of sacramentals, but just some of them, whether by virtue (as specified in the *Book of Blessings*[1], 18) of their own position (as parents regarding their children), or of an ordinary or extraordinary ministry; or whether they play a particular role in the Church, as religious or catechists in some places;

— they are ministers only of some sacramentals, specifically those for which they are expressly granted faculty;

— the liturgical books are the ones that determine that faculty in addition to the rites and the formulae prescribed for the occasions in which a layperson acts as a minister of a sacramental;

— it is left to the wise discretion of the ordinary to decide when it is appropriate for lay people to act as ministers;

— in the presence of a cleric, they should yield the precedence to him (*Book of Blessings*, 19);

— they should have an appropriate pastoral and liturgical training.

Blessings are the most common type of sacramental that may be administered by lay people as ministers due to the effectiveness of their common priesthood, of which they have been made a part by virtue of baptism and confirmation, and by the faculty granted to them by the law. Some of the blessings that may be given by lay people are (the numbers refer to the *Book of Blessings*):

— the blessing on the anniversary of marriage outside Mass (115ff),

— the blessing of children (136ff),

1. *Book of Blessings*, 1989, is the English translation of the *De Benedictionibus* (Typis polyglottis Vaticanis 1984).

— the blessing of an engaged couple (197ff),

— the blessing of a mother before and after childbirth (238ff),

— the blessing of elderly people confined to their homes (345ff),

— the blessing of the sick (378ff),

— the blessing for a catechetical or prayer meeting (512ff),

— the blessing of travelers (618ff),

— the blessing of a new home (661ff),

— the blessing of the various means of transportation (854ff),

— the blessing of technical installations or equipment (901ff),

— the blessing of tools or other equipment for work (921ff),

— the blessing of animals (943ff),

— the blessing of fields and flocks (968ff),

— the blessing of seeds at planting time (988ff),

— the blessing on the occasion of thanksgiving for the harvest (1008ff),

— the blessing of a Christmas manger or nativity scene (1546ff),

— the blessing of a Christmas tree (1575ff),

— the blessing of food for thanksgiving day (1758ff),

— the blessing in thanksgiving (1967ff),

— and the blessing in various other circumstances (1986ff).

In the *Order of Christian Funerals* (General Introduction, 14)[2], it is advised that the vigil and related rites or the rite of committal, be conducted by a layperson when no priest or deacon is available.

2. *Order of Christian Funerals*, 1989 is the English translation of *Ordo Exsequiarum* (Typis polyglottis Vaticanis 1984).

1169 **§ 1. Consecrationes et dedicationes valide peragere possunt qui charactere episcopali insigniti sunt, necnon presbyteri quibus iure vel legitima concessione id permittitur.**

§ 2. Benedictiones, exceptis iis quae Romano Pontifici aut Episcopis reservantur, impertire potest quilibet presbyter.

§ 3. Diaconus illas tantum benedictiones impertire potest, quae ipsi expresse iure permittuntur.

§ 1. Consecrations and dedications can be validly carried out by those who are invested with the episcopal character, and by priests who are permitted to do so by law or by legitimate grant.

§ 2. Any priest can impart blessings, except for those reserved to the Roman Pontiff or to Bishops.

§ 3. A deacon can impart only those blessings which are expressly permitted to him by law.

SOURCES: § 1: c. 1147 § 1; CodCom Resp. I, 29 ian. 1931 (*AAS* 23 [1931] 110); SCRit Resp., 14 apr. 1950; *Ordo Consecrationis Virginum*, 31 maii 1970, 6; *Ordo Benedicendi Oleum Catechumenorum et Infirmorum et Conficiendi Chrisma*, 3 dec. 1970, 6; *SCDW* Resp., mar. 1971; RDCA ch. II, 6; ch. IV, 12
§ 2: c. 1147 §§ 2 et 3; *SC* 79; *Ordo Benedictionis Abbatis*, 9 nov. 1970, *Prae*, 2; *Ordo Benedictionis Abbatissae*, 9 nov. 1970, *Prae*, 2; *Ordo Benedicendi Oleum Catechumenorum et Infirmorum et Conficiendi Chrisma*, 3 dec. 1970, 7, 8; RDCA ch. V, 2; ch. VI, 4; ch. VII, 3
§ 3: c. 1147 § 4; *LG* 29; *SDO* 22; PCIDSVC Resp., 13 nov. 1974 (*AAS* 66 [1974] 667)

CROSS REFERENCES: cc. 530, 604 § 1, 847 § 1, 880 § 2, 1168, 1205, 1206, 1217, 1237

COMMENTARY

María del Mar Martín

1. This canon establishes which ministers can validly carry out consecrations, dedications, and blessings. Consequently, this is the canon that grants the "requisite power"—required from clerics by c. 1168—to be ministers of the three types of sacramentals that are contained in the canon. The concession of the requisite power is established by the norm, taking

into account the grade of orders received and each one of the sacramentals enunciated.

We shall first stop to explain what consecrations, dedications, and blessings are, in order to consider subsequently who can be ministers of each one of those sacramentals.

In principle, a consecration is a sacramental by which persons are permanently devoted to God. However, the *CIC* also uses the term when referring to things, and especially to oils used for some sacraments; thus, in effect, c. 847 § 1 directs that oils be consecrated or blessed, and c. 880 § 2 prescribes that the chrism used for confirmation should be consecrated. A typical case of consecrations of persons is the consecration of virgins (c.604 § 1).

A dedication, for its part, is a sacramental by which certain places or things are permanently dedicated (such as churches, c.1217; or altars, c.1237) to divine worship; by dedication, those places or things become sacred (c. 1205).[1]

With regard to blessings, the *CIC*/1917 made a distinction between "constitutive"and "invocatory" (c.1148 § 1). Blessings were *constitutive* when they devoted a person or thing to divine worship; however, they were *invocatory* when divine gifts and especially spiritual effects were implored for persons or things. This distinction does not expressly appear in the *CIC*, but it can be inferred from its norms, since "all those things or places devoted to divine worship that do not require dedications (as is required by *domus ecclesiae* and fixed altars), are to be blessed in order for them to be sacred things or places."[2]

2. In light of the foregoing, § 1 of the canon specifies that consecrations and dedications can be carried out validly by those who are invested with the episcopal character, but they can also be administered by priests who are authorized to do so by law or by legitimate grant.

By way of example, it is incumbent upon a bishop to impart the following consecrations and dedications:

— the consecration of virgins: [3] the minister is the ordinary bishop, in accordance with the *Ordo consecrationis*,[4] while c. 604 § 1 establishes that "[virgins] are consecrated to God by the diocesan Bishop";

— the dedication of a church: this dedication is incumbent upon the diocesan bishop. If he cannot assist, he will entrust it to another bishop, usually the one who may be associated with the pastoral work of the

1. Cf. *Comm.* 12 (1980), p. 325.
2. T. RINCÓN, "Disciplina canónica del culto divino," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 580. Cf. *I sacramentali e le benedizioni* (Genova 1989), pp. 114–116.
3. Cf. *I sacramentali e le benedizioni*..., cit., pp. 12–29.
4. Cf. *Ordo consecrationis virginis* (Typis polyglottis Vaticanis 1970), no. 6.

faithful of that church; in the most exceptional circumstances, he can entrust the mandate to a priest (RDCA , II, 5);

— the dedication of an altar: this dedication is also incumbent on the diocesan bishop; if he cannot do it, the *Ordo* applies the same substitution rule it employs for the dedication of a church (RDCA , IV, 12).

With respect to the priests empowered by the law or by legitimate grant, it must be pointed out that such faculty comes both from the *CIC* and the corresponding *Ordo*, which, as illustrated by the above-mentioned examples, specifies the conditions in which such faculty must be granted and who will grant it.

As a general norm, the *CIC* indicates in c. 1206 that the dedication of sacred places belongs to the diocesan bishop and to those equivalent to him in law; that is, pursuant to cc. 381 § 2 and 368, they are also ministers of consecration, although they do not posses the episcopal character. In this case, then, territorial prelates and abbots, apostolic vicars, prefects and administrators are also ministers of consecration but only if the apostolic administrations have been erected on a stable basis.

Are these prelates equivalent in law to the diocesan bishop also ministers of consecrations even if they do not have an episcopal character? It would seem so, or at least for the consecration of virgins, if we take into account c. 604 § 1, and apply (c. 381 § 2) the general rule that where the *CIC* points at the diocesan bishop, it is understood to be referring also to those equivalent in law, unless the nature of the matter so prevents it or is otherwise specified in the law.

The remaining priests require "legitimate concession" of the faculty to be able to be ministers of consecrations and dedications. In the above-mentioned examples of dedications, this concession is granted only exceptionally or in very special circumstances when the diocesan bishop is unable to perform the dedication. The *CIC* also uses a term that is similar to that of rites: they can depute, "in exceptional cases," a priest for dedicating a place (1206).

3. In §§ 2 and 3 of the canon, the ministers of blessings are prescribed:

— priests, except for those blessings reserved to the Roman Pontiff and the bishops;

— deacons, but only for those blessings expressly permitted to them by law.[5]

a) With respect to reservations, the liturgical reform has taken into account the criterion of Vatican Council II: "Reserved blessings shall be very few. Reservations shall be in favor only of Bishops or Ordinaries"

5. Cf. *SDO*, no. 22 and its interpretation by the PCIDSVC, Resp., November 13, 1974, in *AAS* 66 (1974), p. 667.

(*SC* 79). In the various rites, it is found that, in fact, the reserved blessings in the strict sense are few, because in many cases a bishop can delegate to a priest any of the following:

— the blessing of an abbot or abbess: the minister is the bishop of the place where the monastery is located, but another bishop or another abbot,[6] who may not be a bishop, may be permitted to perform it with just cause;

— the rite of placing the first stone or the blessing of the start of the works of the new church: if the diocesan bishop cannot do it, he will entrust it to another bishop or priest, especially to the one he has as a collaborator in the pastoral care in the community for whom the church is being built (RDCA, I, 3);

— the blessing of the church or oratory: this blessing will be conducted by the diocesan bishop or by the priest delegated by him (RDCA, V, 10);

— the dedication of a moveable altar: it is incumbent upon a diocesan bishop or the guiding priest of the church to perform this dedication (RDCA, VI, 4).

The *Book of Blessings*[7] only reserves to the diocesan bishop the blessing of the new episcopal chair (no. 1153); however, another bishop, but not a priest, can do it with a special mandate "in adiunctis omnino peculiaribus."

In the other blessings where a bishop is named as minister, a substitute formula is always added for a priest to be minister. That is what happens in the following cases:

— blessing of a new seminary: "The present order may be used by a Bishop and also a priest" (*Book of Blessings*, 681);

— blessing of a new baptistry or baptismal font: this is reserved to the diocesan bishop, who can entrust it to a priest, mainly to the one that helps in the pastoral care of the community where the new baptistry or baptismal font is being erected (*Book of Blessings*, 681).

— blessing of a new cemetery: this is reserved to the diocesan bishop, who can entrust it to a priest, mainly to one that helps in the pastoral care of the community where the new cemetery is being erected (*Book of Blessings*, 1419).

b) In express reference to priests, the following are ministers of the sacramental in the blessing of the following cases:

— the blessing of the chalice and the paten (RDCA, VII, 2);

6. Cf. *Ordo Benedictionis Abbatis et Abbatissae* (Typis polyglottis Vaticanis 1970), I, no. 2; II, no. 2.

7. *Book of Blessings*, 1989, is the English translation of *De Benedictionibus* (Typis polyglottis Vaticanis 1984).

— except for those described above, all other blessings contained in the *Book of Blessings*, such as "blessings directly pertaining to persons," "blessings related to buildings and to various forms of human activity," "blessing of objects that are designed or erected for use in churches, either in the liturgy or in popular devotions," "blessing of articles meant to foster the devotion of the Christian people," "blessings for various needs and occasions";

— in some cases, the blessing of the bell, organ, cross, and images that are venerated publicly; that is, for the "blessings of objects that are designed or erected for use in churches, either in the liturgy or in popular devotions."

The *CIC* also notes as functions entrusted especially to parish priests the apostolic blessing, the nuptial blessing, the blessing of the baptismal font, and the solemn blessings outside the church (c. 530,3°,4°,6°).

c) Deacons are ministers of the blessings to the extent permitted by the law. Such law must be the liturgical law, in accordance with c. 2; as a matter of fact, we do not find any norm in the *CIC* that refers to this aspect, except for those that belong to this title of the *CIC* on the sacramentals.

Deacons, as ministers of blessings, have been granted faculties in the *Book of Blessings* on several occasions, so it is easier to specify on which occasions they have not received them. And the best way to do so is by reviewing each of the five parts that make up the *Book of Blessings*:

— *benedictiones personarum*: deacons can administer all of these, except those imparted to missionaries (453);

— *benedictiones aedium et navitatum*: deacons cannot bless a new seminary (681) or a new religious house (704);

— "Benedictiones locorum et rerum vitae liturgicae conexarum": here the criterion changes, that is, in most cases the deacon's faculty is not recognized, except for two types of blessings: blessing of the articles for liturgical use (vestments worn by ordained ministers, corporals, altar cloths, etc—the chalice and the paten are excluded), but using a brief rite for this (1346, 1362); and the blessing of holy water (1086).

In the last two parts of the *Book of Blessings* ("benedictiones rerum ad devotiones pertinentium" and "benedictiones ad diversa"), no restriction is found.

Deacons can also be ministers of funerals. In effect, the Council indicated that it is incumbent upon their ministry "to officiate at funeral and burial services"(*LG* 29). It is also so specified in the *Order of Christian Funerals* (cf. nos. 14 and 151).[8]

8. Cf. *Order of Christian Funerals*, 1989.

4. In light of what has been explained so far, it is appropriate to deal with yet one last point, in order to address the validity and legality of the administration of sacramentals prescribed in the canon.

a) As far as consecrations and dedications are concerned, it seems to be clear that, under the provisions of c. 1169, in order for the priest to carry them out validly, he needs to be permitted to do so by the law—either from the Code or from liturgical law—or by legitimate grant. Those who have an episcopal character will always administer them validly—although for some reason they may commit an illicit act—unless there is a reservation in favor of the Roman Pontiff; for those specific instances, even if they have the episcopal character, bishops would lack the requisite power required by c.1168 and that is generally granted by c.1169.

b) With respect to blessings, the following can be noted:

— bishops always impart them validly;

— priests will always impart validly those blessings that are not reserved to the Roman Pontiff or a bishop (note that the reservations made to certain priests, either church rectors or parish priests, are not made strictly in relation to blessings). Canon 1147 § 3 of the *CIC*/1917 added that "if a priest imparts a reserved blessing without the necessary license, it is illicit, but valid, unless the Apostolic See otherwise expressly provided in the reservation." It seems to us that the *CIC*/1917 criterion may still be applicable currently;

— deacons can licitly and validly impart the blessings expressly permitted to them (c. 1147 § 4 of the *CIC*/1917).

1170 Benedictiones, imprimis impertiendae catholicis, dari possunt catechumenis quoque, immo, nisi obstet Ecclesiae prohibitio, etiam non catholicis.

While blessings are to be imparted primarily to Catholics, they may be given also to catechumens and, unless there is a prohibition by the Church, even to non-Catholics.

SOURCES: c. 1149; SCRit Resp. Vicario Apostolico Gabonensi, 8 mar. 1919 (*AAS* 11 [1919] 144); RCIA 18, 102

CROSS REFERENCES: cc. 199, 204–207, 213, 214, 383, 528 § 1, 788, 844, 851,1°, 1352

COMMENTARY

María del Mar Martín

This canon refers to persons to whom the sacramental blessing can be imparted. Without question, this is the most usual sacramental (for subjects of other sacramentals, we will have to abide by what is determined for each specific sacramental, thus, for example, the c. 1183 for funerals).

This canon makes a triple distinction with respect to the passive subjects of blessings: Catholics, catechumens, and non-Catholics.

1. It is in the first place to Catholics that blessings are to be imparted; this makes sense, because, since they are precisely the ones who have been incorporated to Christ by baptism and integrated to the people of God (c. 204), they are the first in benefiting from the spiritual goods administered by the Church. According to c. 213 "Christ's faithful have the right to be assisted by their Pastors from the spiritual riches of the Church ..."; such riches include blessings. Also, this right should be understood to be inalienable under the provisions of c. 199,3°. However, it is possible to prohibit the reception of a sacramental by imposing a canonical penalty, and in those cases one ceases to be the passive subject of a blessing unless there is cause for the effect of a penalty to be suspended (c. 1352).

2. This canon indicates that catechumens can also receive blessings; no condition is imposed for that, so it should be understood in general and as being provided by the norms governing the catechumens. Catechumens are understood to be those persons who, moved by the Holy Spirit, are expressing the explicit desire to be incorporated into the Church (c. 206).

Even if they are not yet members (faithful) of the people of God, they are joined to it by this very desire, and the Church cherishes them as its own. The Church should have a special care for catechumens; it will introduce them to the celebration of the sacred rites and will accord them some prerogatives that are proper to Christians (c. 206 § 2). Note that the canon does not talk about rights but prerogatives; these include being the passive subject of blessings, just like the faithful.

It is therefore not possible to talk of a true right to receive this spiritual aid, because the catechumen is not the subject of rights and duties within the Catholic Church in the same manner in which the faithful are. This does not mean that catechumens will not fall within the domain of the canon law. In effect, pursuant to the teaching of Vatican II and the norms that developed from it (*SC* 64; *ES*, III, 18), c. 788 §§ 1 and 2 prescribes that catechumens are admitted to the catechumenate in liturgical ceremonies, initiated in the mystery of salvation, introduced to the life of faith, liturgy, of the charity of the people of God, and the apostolate. Paragraph 3 of the same canon makes it incumbent upon the bishops' conference to establish the content of the legal condition of catechumens, that is, their obligations and prerogatives. Ultimately, since they are preparing to be incorporated fully into the Church, it may recognize certain duties and faculties in them.[1]

3. As far as non-Catholics are concerned, as Lombardía noted, "it is a common doctrine among theologians that the unfaithful, to whom the salvific will of God is also extended as it is to the baptized, are potential members of the Mystical Body of God 'quod est Ecclesia' (Col 1:24), for belonging like all people to the supernatural order ..., the salvific will of God is extended to all, Christ died and prayed for all, and God offers all the necessary graces to be saved or, as Saint Thomas puts it, the necessary graces to fulfill the law";[2] thus the sacramentals—in this case blessings—can impart to non-Catholics the necessary spiritual dispositions to fulfill the natural law, in order to attain salvation and eventually receive the gift of faith. Consequently, blessings are also beneficial and desirable for non-Catholics, for they are partakers and beneficiaries of the prayers of the Church.

The condition imposed by the canon for non-Catholics to receive blessings is that there should be no prohibition from the Church. At any rate, as an analogy with the regulation of the *communicatio in sacris*, it is desirable to avoid such blessings if there is danger of error or indifferentism(c. 844 § 2).

1. P. LOMBARDÍA, "Infieles," in *Escritos de Derecho Canónico* (Pamplona 1973), pp. 63–141.
2. Ibid., p. 68.

4. The *Book of Blessings*[3] contains similar provisions in its no. 31, wherein the minister of a blessing is advised to bear in mind the prescription of c. 1170 regarding the subjects of whose benefit the sacramental is imparted.

The *Book of Blessings* also adds that when blessings are to be celebrated in the community with the separated brethren, it is imperative to observe in each case the norms established by the local ordinary (no. 31).

3. *Book of Blessings*, 1989, is the English translation of *De Benedictionibus* (Typis polyglottis Vaticanis 1984).

1171 Res sacrae, quae dedicatione vel benedictione ad divinum cultum destinatae sunt, reverenter tractentur nec ad usum profanum vel non proprium adhibeantur, etiamsi in dominio sint privatorum.

Sacred objects, set aside for divine worship by dedication or blessing, are to be treated with reverence. They are not to be made over to secular or inappropriate use, even though they may belong to private persons.

SOURCES: c. 1150

CROSS REFERENCES: cc. 847 § 2, 1269, 1375–1377

COMMENTARY

María del Mar Martín

1. This canon notes one of the juridical effects derived from some sacramentals: that the sacred objects that are destined for us in worship through dedication—in some cases they are dedicated to worship by consecration, for example, holy oils (c. 880 § 2)—or by constitutive blessing are to be dealt with in accordance with their legal condition of *res sacrae*; that is, they should not be employed for secular or improper uses, regardless of the (ecclesiastical or private) ownership of the objects.

The canon refers only to sacred objects, and not to sacred places or to persons. For sacred places, the *CIC* reserves the norms contained in cc. 1210–1212. With respect to persons, the legislator looks more to the actions of these persons through norms that regulate conduct that is thought unfit of the faithful in general, of the sacred ministers or the members of institutes of consecrated life, and societies of apostolic life.

2. By profane or improper use, we should understand that person who diverts the *res sacrae* from its immediate purpose of worship and of the sanctification of souls. And, even if for any reason the sacred object is not to be used for such a purpose, so long as it preserves its sacred character—i.e., so long as it does not lose its dedication or blessing—it possesses a special dignity that justifies the prohibition to employ it for these profane and improper uses.

The dignity of sacred objects also affects the way they can be treated in a financial sense. In fact, c. 1269 establishes that sacred objects in private ownership may be acquired by private persons by prescription, but without this resulting in a change of usage; rather, the prohibition of reducing them to profane uses remains in effect. If the sacred objects belong

to a public ecclesiastical juridical person, they may be acquired only by another public ecclesiastical juridical person. The prescription of c. 1269 with respect to c. 1171 reveals that the legislator limits the right of ownership over the sacred objects. This limitation covers both their usage and patrimonial conveyance.

3. For a *res sacra* to be reduced to profane uses, it must have lost its dedication or blessing (c. 1269) and, therefore, its sacred character. That phenomenon is called *execratio*: "*execratio* is the loss of consecration or blessing of a sacred object ..., since consecration or blessing is of ecclesiastical institution, it is only lost when it is so determined by the Church."[1]

The *CIC* contains express norms on the *execratio* of sacred places (c. 1212) but not of sacred objects. On the contrary, the *CIC*/1917 did regulate the loss of sacred character of blessed or consecrated utensils. In this respect, c. 1305 § 1 prescribed that *execratio* occurred when they sustained such injuries or changes as to lose their shape and be rendered unsuitable for their proper usage; also if they were employed for decent uses or were exposed to public sale. The same norm, in § 2, prescribed that the chalice and paten would not lose their consecration if the gold-plating became destroyed or renewed.

Nowadays, in light of the absence of canonical norms on the desecration of sacred objects, we can refer to the criterion of c. 19 that authorizes the recourse to the provisions of laws specified for similar cases such as this one. Consequently, the *execratio* of sacred objects in keeping with c. 1212 (see commentary) will result from these objects being in great measure destroyed or reduced to profane uses by a bishop's decree or permanent application.

Once the *execratio* has been effected, it is licit to employ the objects that were sacred for profane uses. However, even in those cases, the *CIC*/1917 (c. 1510 § 2) prescribed that such uses should not be indecent.

Contrary to what the above-annotated canon specifies, the *CIC* establishes the profane or improper use of sacred objects (whether moveable or immovable) as an offense. This offense is punished with an indeterminate mandatory *ferendae sententiae* penalty (see commentary on c. 1376).

1. F. SANTAMARÍA PEÑA, *Comentarios al Código canónico* (Madrid 1922), p. 21.

1172 **§ 1. Nemo exorcismos in obsessos proferre legitime potest, nisi ab Ordinario loci peculiarem et expressam licentiam obtinuerit.**

§ 2. Haec licentia ab Ordinario loci concedatur tantummodo presbytero pietate, scientia, prudentia ac vitae integritate praedito.

§ 1. No one may lawfully exorcise the possessed without the special and express permission of the local Ordinary.

§ 2. This permission is to be granted by the local Ordinary only to a priest who is endowed with piety, knowledge, prudence and integrity of life.

SOURCES: §1: c. 1151 §1
§2: c. 1151 §2

CROSS REFERENCES: cc. 1166, 1168

COMMENTARY

María del Mar Martín

1. Recent studies on exorcism have been critical of the definition that looks at it as "a rite established by the Church with the aim of removing the devil from some person, object or place." For those authors, such a definition does not take into account an exorcism's character proper to the sacramentals—sacred signs by which, in a sense as an imitation of the sacraments, certain effects, especially spiritual effects, are signified and obtained by the prayers of the Church (c. 1166)—which ultimately appears by its systematic placement in the *CIC* to be an act of divine worship, "intenso alla santificazione."[1]

Indeed, this canon does not provide a definition of exorcism, but there are two aspects that the *CIC* clearly includes: it is considered to be a sacramental by the legislator, and it only talks about exorcising the possessed, that is, about persons. However, the canonical regulation does not exhaust the ecclesial reality of sacramental exorcism, because it does not take into account the exorcisms of the RCIA, nos. 44 and 156. This practice, which can be called the "official" practice of the Church, is added to another of an "unofficial" character, which originates from the piety of the faithful, and which manifests itself in the use of prayers and ascetic

1. A.M. TRIACCA, "L'esorcismo," in *I sacramentali e le benedizioni* (Genova 1989), p.171.

practices to remove or prevent the influence of the Evil One, reject its temptations, etc. This practice—which precedes the establishment of the exorcist—emerges as a requirement of the Christians' struggle against Satan (Eph 6:10–13) who hunts around for a prey to devour (1 Pet 5:8).

Based on the conventional classification of exorcisms as "public and private": they are public when administered on behalf of the Church by an authorized person and in accordance with the established rites; otherwise, they are private. They are also "solemn and simple": solemn exorcisms are those public ones prescribed for cases of diabolical possession or obsession; simple ones are those that form part of another rite, such as the catechumenate or baptism. An effort has been made to provide a more appropriate, that is, deeper and more accurate liturgico-juridical and devotional explanation of today's complex reality of exorcism. Such effort is reflected in the following scheme:

1) exorcism in the strict sense (sacramental): it is always *apotropaic*, that is, the primary purpose is to avert the diabolical influence, which is either presupposedly present in those persons who do not belong to the Church by baptism, or present anew in the possessed. From this explanation, two established types of exorcisms ensue:

a) liturgical *sic et simpliciter*: this type intends to remove the diabolical influence from the catechumens. It is subdivided into two classes:

— first or minor exorcisms, which are arranged in a deprecatory and positive way, showing catechumens the true condition of spiritual life, the struggle between flesh and spirit, etc. (RCIA, 101);

— second or majorexorcisms, which complete the scrutinies; these are intended to purify souls, protect catechumens against temptations, etc. (RCIA, 154).

b) solemn exorcisms: this type is established in c. 1172 and in the *Ritual of exorcisms* of November 22, 1999, regarding exorcism of the possessed.

2) exorcism in the broad sense (Christian devotion): this is not an official exorcism like the previous ones, and it is designed to have mainly preventive effects, although the other *apotropaic* type of purpose is also possible; this category is divided into the following types:

a) preventive or prophylactic exorcisms: as in the *Oratio dominica*, these are prayers designed to prevent the influence of the devil, reject temptations, etc.

b) apotropaic exorcisms: devotional prayer to remove the influence of the devil. In ancient times, the faithful who were endowed with a particular charisma were asked to cast out the devil by releasing the person with fasting and prayer according to the advice of Jesus (Mt 17, 20–21).[2]

2. For a complete and systematic explanation of this pratice cf. ibid., pp. 190, 171–188.

From the classification proposed, it follows that in proceeding to its liturgical or juridical regulation, the Church pays attention only to exorcisms in the strict sense; regarding the other exorcisms, it plays its general role of vigilance over the customs and the faith of the faithful, so that they do not adopt improper forms (such as superstition) of the catholic faith.[3]

2. Based on the classification made and the existing liturgical and juridical norms, the ministers of exorcisms are as follows:

a) for the first or minor exorcisms: even worthy and opportunely trained catechists can be ministers (RCIA, 44, 48, 65, 66);

b) for the second or major exorcisms; those who complete the scrutinies are ministers (priests and the deacons) (RCIA, 156);

c) for the solemn exorcisms, which is the one specified here, the minister should meet the following requirements, according to the canon: to be a priest, to have a special (*ad casum* specific) and express license of the local ordinary, and to be endowed with piety, knowledge, prudence, and integrity of life. The *CIC*/1917 required that the express license for the ordinary should be for each specific case, that is, not a general or habitual one (c. 1151§ 1). Such a requirement—which is also present in the existing norm—implies that neither the alleged nor the tacit one is suitable.[4]

d) for exorcisms in the broad sense: all the faithful are ministers of these exorcisms by virtue of their common priesthood. There are no norms that expressly regulate them.

3. Prior to *Motu proprio Ministeria quaedam* becoming effective, minor orders included exorcist (c. 949 of the *CIC*/1917), and although with *Ministeria quaedam*, it disappeared from all common ministries of the Latin Church, Paul VI gave the bishops' conferences the possibility of requesting "the Apostolic See to establish other [ministries] that for particular reasons they may deem to be necessary or very useful in the region itself. These include, for instance, the office of *porter, exorcist* and *catechist*" (*MQ, preface*).

The *Ministeria quaedam* norm will have to be reconciled with the subsequent c. 1172 on which we are commenting. Unless the Apostolic See dispenses with the *CIC* norm in approving its establishment for a certain bishops' conference, the exorcist established as a ministry cannot administer exorcisms to the possessed if he does not meet the requirements prescribed by the canon, including being a cleric.

From the foregoing, we may conclude that in so far as the *CIC* discipline for exorcists is concerned, that is, the minister for the sacramental of exorcism only for cases of possession or obsession, appropriate

3. Cf. in this regard CDF, *Epistula Ordinariis locorum: in mentem normas vigentes de exorcismis revocantur*, in *AAS* 77 (1985), pp. 1169–1170.

4. Cf. CDWDS, "Ritual Per totum historiae" (November 22, 1998), in *Notitiae* 35 (1999), pp. 138–150, nos. 13 ff; cf. also *CCC* 1673.

characteristics are not given for it to be considered a ministry of a nature similar to those regulated by *Ministeria quaedam.*

4. Regarding the passive subjects of various exorcisms, the following norm can be maintained: in the exorcisms in the strict sense, only certain persons are passive subjects—catechumens in the proper rites and the baptized who are considered to be possessed in the case of c. 1172. Accordingly, the Church does not currently use this sacramental for objects or places, etc. The *CIC*/1917 specified that exorcisms could be performed on passive subjects such as the faithful, catechumens, non-Catholics and excommunicates (c. 1152).

The same does not apply to exorcisms in the broad sense. Although they have a primarily personal purpose, whether they are intended for oneself or others, they are also performed to remove or prevent diabolical influences on things, animals, places, etc.

It must be added that the *CIC* does not attempt to establish the requisite characteristics needed to consider a person to be possessed. The term used by c. 1172 to designate those persons is that of *obsessus*, which translates into English as the *possessed*, following the criterion that was already used in c. 1151 § 1 of the *CIC*/1917. However, commentaries to the above-mentioned canon warned about the difficulty in understanding the term *obsessus*. Although not in complete agreement about it, the authors commonly admit the administration of exorcisms both in the case of *diabolical obsession* (when the devil, through external action, permanently prevents the actions of an individual) and in the case of *possession* (the presence of Satan within the body of the person over whom a more or less total command is exercised in order to act through the organism of the bedeviled person).[5]

In any event, the prudence with which we ought to proceed in these cases in order to avoid misinterpretations that can easily reflect on the prestige of the Church itself and in the good name of persons (c. 220), warrants an intervention of the ecclesiastical authority through a particular and express license with the aim of proceeding with adequate guarantees. Moreover, the *CIC*/1917 added an express mandate to the exorcist such that, before proceeding to administer the exorcism, he must conduct a careful and cautious investigation with a view to ascertaining the veracity of the obsession or possession (c. 1151 § 2). And the current *Ritual of Exorcisms*, in addition to insisting on the caution used to verify the case, establishes criteria for achieving a moral certainty of possession before proceeding with the exorcism.[6]

5. Cf. L. MIGUÉLEZ, commentary on c. 1151, in *Código de Derecho Canónico y legislación complementaria* (Madrid 1974).
6. Cf. CDWDS, "Ritual Per totum historiae," cit., nos. 13–18.

TITULUS II
De liturgia horarum

TITLE II
The Liturgy of the Hours

INTRODUCTION

José Antonio Abad

1. *The example of the Lord*

Jesus Christ was a great man of prayer. Already in his hidden life, and when he was still very young, he would come up to Jerusalem to celebrate the main Jewish holiday—the Passover. He would assiduously participate in the prayers at the synagogue, and he would recite his prayers everyday as a pious Israelite.

The Gospels have left so many testimonies to Jesus' prayer life during his public ministry that, were those testimonies to be eliminated, the Gospel narrative would be significantly mutilated and distorted. According to the Synoptics, Jesus would retire frequently to pray by himself to his Father; he would sometimes spend the whole night praying, and at other times he would get up before dawn to pray. On the other hand, the great moments of his ministry were also marked by a prolonged prayer: before starting a sermon, he would go into seclusion in the desert for forty days, where he remained to fast and pray; before the election of the disciples, he spent the whole night praying; he spent three hours praying to his Father before starting his sacred Passion; and while he was offering his life on the Cross, he was constantly addressing the Father with an intimate and trusting prayer.

Jesus was not only a great man of prayer but also a master of prayer. He often talked about it—about the need for it, about its efficacy and requirements. He even taught his disciples a specific prayer, the Our Father, a prayer that shows the fundamental attitude of all of his prayer: by following his example they should address God as a Father. Lastly, he advised them to "pray without ceasing" (1 Thess 5:17).

Early Christians learned from the Apostles about the need to pray always and about the attitudes with which they should do so. The Apostles advocated incorporating prayer into one's daily life in a most natural way,

by using psalms from the Bible, canticles and blessings, and other typically Christian compositions, including thanksgivings, praises, blessings, confessions of faith, prayers to overcome temptations and fulfill the will of the Father, forgiveness of persecutors, help in obtaining strength and perseverance, charity, and salvation; one should also pray for one's rulers. In the early days of the Church, the Apostles also continued to advocate visits to the Temple and the synagogue and observance of the hours of prayer of the Jews.

2. *First attempts at organization*

The regime of a Christian-style daily prayer began very soon after the organization of Christian groups. According to the Didaché,[1] instead of praying the Jewish Shema three times per day, they would pray the Our Father and conclude with a doxology. Saint Clement of Rome[2] had already spoken about a prayer recited at established hours, although it was necessary to wait until the beginning of the third century for steady hours of prayer to appear in Egypt for the *terce*, *sext* and *none*, as well as for the hours of rising and going to bed, in accordance with Clement of Alexandria's testimony.[3] Clement otherwise insisted on the fact that the true Christian—the gnostic or spiritual Christian, when he speaks—should pray without ceasing. Tertullian spoke of obligatory or legitimate prayers, which are celebrated at sunrise and sunset—he does not specify if they are celebrated in private or in common, nor does he try to justify them, since they were already a part of the Christian regular customs—and common prayers—Terce, Sext and None—which he considers biblically justified but not obligatory.[4] He also knew the vigil as a time for prayer; a Christian will break his sleep to consecrate himself to something so desirable as it is to address himself in a filial way to God.[5] As far as the number of hours is concerned, Hippolytus concurs with Tertullian, even though he justifies the Terce, Sext and None as being a memory of Christ's Passion and understood in its Paschal dynamism, that is, linked to Resurrection.

The unbroken tradition continued peacefully from the time of Tertullian and Hippolytus, although it was broken up in a certain way by Origen, who accepted the tertiary number for hourly prayer—the morning, the afternoon and the night vigil; he does not mention the Terce or None.[6] However, St. Cyprian spoke of three morning hours again: Terce, Sext and

1. *Didaké*, 8.
2. Clement of Rome, 1 Cor., 40.
3. *Strommata*, 7, 7, 40, 3.
4. *De Oratione 25*, ML 1, 1300.
5. *De Ieiuniis 10*, ML 2, 966–968.
6. *De Oratione 12* (Spanish text in *Tratado sobre la oración*) (Madrid 1953), 83–88.

None,[7] albeit insisting (like Tertullian) on the fact that the prayer schedule was not fulfilled with the sole observance of these hours. He also spoke of the morning and evening prayers, which he related to the Resurrection of the Lord and to the metaphor of Christ as "light without sunset."

Were these prayers of the hours private or liturgical prayers, or something in between? Since this tradition began in such an ancient period, the best response would seem to be to just say that Christians prayed. Whether they did it in private or in common would seem to depend not so much on the nature of the prayer as it did on the presence or absence of others when the time for praying came. During the periods of persecution and on working days, prayers were usually said in private, but whenever possible, they would get together to pray in common. As persecutions came to an end and with a large increase in the number of specific places of worship, it became possible for such rhythms of prayer to manifest themselves externally. What is doubtless true is that by the end of the third century Christians formed a prayer community every time they would pray, for they would all do so at the same hours.

3. *Peace: the monastic and cathedral offices*

The arrival of peace between Empire and Church produced a beneficial liturgical development that also affected prayer, since thereafter the first attempts were made to organize prayer, and the most archaic form of the divine office was formulated. This was done between the fourth and sixth centuries—both in the East and West—by involving bishops and priests (the cathedral office), and ascetics and monks (monastic office). The cathedral office took place in the regular local communities and would center primarily on two times: the morning and the afternoon office—sometimes, there was a vigil office—and the entire Christian community would take part in these prayers: the bishop, his presbytery, the remaining clerics, and the faithful. The monastic office was organized around the monks, understood in a broad sense. This office filled the hours of prayer from the preceding period with content and created a number of new ones. This office created prayer specifically for the following hours: *a)* the classic morning and afternoon hours; *b)* the three morning hours of the Terce, Sext and None; *c)* Prime (located between the prayer of dawn and Terce); and *d)* Compline (upon going to bed). Except for the Pacomian monks—who would only pray in common on morning and afternoon hours—the other monastic families would pray all the hours in common. The book of Psalms was the centerpiece of the cathedral and monastic offices, up to the point of originating the most creative

7. *De Oratione Dominica 34*, ML 4, 559.

and varied contributions from the various cursus or psalm arrangements of the monastic office.

The monastic and cathedral offices were both different from and complementary to one another. They coexisted in the same church in peaceful harmony and mutual enrichment; in fact, many monastic rules, without further consideration, adopted the morning and afternoon prayers of the cathedral office or added a properly monastic psalmic station. This union between both rhythms of prayer was carried out in a very natural way in the churches of urban communities that were visited frequently by ascetics and monks who lived in the city, as was the case in Rome. In those cases in which presbyters would share their lives in common around a bishop, the faithful were fervently urged to pray with them during the nonmandatory hours, especially at those times of more intense praying, such as at Lent, rogations, etc.

The harmonious meeting of the two expressions of the prayers of the hours constitutes the traditional heritage of the divine office, both in the East and the West.

4. *Later development*

During the sixth to the ninth centuries there evolved, among other developments, the following phenomena: the office of the liturgy of the hours became structured in all its parts; it was celebrated solemnly on a daily basis and with the participation of the entire clergy and the people (hence its ecclesial character); the peculiarities of each church became consolidated; and, in the West, the Roman and Benedictine rites merged, thus eventually becoming what is known as the office of the West, thanks to its diffusion in Europe by the same Benedictine monks and other monks. This Roman-Benedictine office structure was to last until the reform of St. Pius X.

In some places, though, the Roman-Benedictine office was not adopted. Some churches preserved their own way or introduced variations, which, although certainly quite numerous, were never fundamental. Featured prominently in these variations was the celebration of the saint's office and other offices (e.g., penitential and gradual psalms, and the funeral offices), which were originally non-liturgical, but ended up being so, until the reform of St. Pius V.

The tenth through the fifteenth centuries saw a seminal event in the development of the liturgy of the hours: the abandonment of a common and solemn office, followed by the birth and the growth of private celebration. The disintegration of the cathedral liturgy system, the practice of the Roman Curia, and the influx of the mendicant orders particularly influenced this event.

The disintegration of the cathedral liturgy system was the most important cause, since it was prompted by a situational change from predominantly urban parishes to rural parishes; at these parishes it was becoming very difficult, if not impossible, for the clergy to take care of all the ministerial duties that were previously covered by the bishop and his presbytery. and also for them to recite the whole office in common with their community. They could have opted for the restoration of the original cathedral office, with the Lauds and Vespers, at least on holidays, thereby recovering the practice that had been in effect for several centuries, in which the secular clergy and their respective community would meet at the two traditional morning and afternoon hours and the clergy would collectively complete the other hours. However, a preference was shown for the clergy to recite the office. This clericalization of the office also brought about the growth of private prayer.

Regarding the moral obligation of common prayer, this discipline evolved slowly. While councils and bishops insisted on the obligation of the choral office, jurists and theologians began to justify the practice of private offices as a substitution for the solemn celebration. During the twelfth century, Hostiense (†1271) argued that prelates and all clerics could be dispensed from the choral office for a just cause, although on the condition that they would pray the hours in private; he also argued that minor clerics were not obliged to recite the office. This issue continued to be discussed until the fifteenth century, when this obligation was limited to those who had received the subdiaconate. St. Thomas established the doctrine that provides for the confirmation and justification of the private celebration of the office and, subsequently, the obligation to do so. While the duty to pray to God is a personal one and lasts forever, according to Aquinas, the ecclesiastic who receives a benefice is bound to the positive laws that are attached to the residence or that authorize a substitute. Henry of Gant (†1293) had already pointed out that it was a grave sin for a cleric with a benefice or religious to fail to recite the office. After Henry, the church gradually came to the Decretals of Clement V and, finally, to the fifteenth century practice. At this point, the Council of Basle (1435) decreed that those who had benefices but were not able to take part in the choral office should recite it in private. The lack of residence and the buildup of benefices at the time could not help but further the recitation of the office in private.

As far as the parish clergy before Trent was concerned, there was no synod that bound, or even approved the private recitation in a habitual manner. In fact, until the end of the sixteenth century, Church legislation considered the private recitation of the office as an exception that was admissible only in cases of need. In its reformation decrees (Sess. XXI, c. 4), the Council of Trent itself refers to the public recitation of the office in parishes and never to a private office. Despite this official line, the medieval practice of recitation in common as the only norm for all, having

undergone the strain of new forms of spirituality and of apostolic and religious life, managed to turn private recitation into a customary norm, with the almost exclusive exception of monasteries. The so-called "devotio moderna" with its postulates and practices of a more individual spirituality than the medieval ones, contributed powerfully to the affirmation of the private recitation of the office among the secular clergy and to the separation of the Christian community from the office.

5. *From the* CIC/*1917 to the* CIC

Despite the attempted reforms of the incipient Modern Liturgical Movement and of St. Pius X, on the eve of the *CIC*/1917, the divine office's status was as follows: the community or choral recitation was virtually exclusive to monks (and of some clerical communities of a more or less monastic flavor and origin); the people did not participate or see in it a prayer that belonged to them; the secular clergy would recite the office in private, did not have any concern for the sanctification of the hours of the day, and saw it, more often than not, as more of a burden than as a medium for personal and ministerial sanctification. Otherwise, the office was a public prayer by the official deputation that the Church would grant to certain people, which entailed a more juridical rather than theological ecclesiality.

The *CIC*/1917 incorporated and sanctioned this state of affairs, because it provided for the choral and community office from a monastic or benefice perspective, thus excluding the ordinary secular clergy from this mode of recitation; it would not even state that the faithful people may participate in the office; and so far as the secular clergy is concerned, *CIC*/1917 looked at it from the perspective of a deputation and of the obligation to recite it daily, without any concern about whether it should serve to sanctify the various hours of the day. In fact, many good priests would recite Compline very early in the morning and others would recite Lauds at dusk or at the end of the day.

While the true change occurred at the Second Vatican Council, this state of affairs was becoming theologically modified as the Modern Liturgical Movement gained ground. The basic points retrieved by *Sacrosanctum Concilium* include: the veritas horarum, that is, regarding the divine office as a true liturgy of the hours, a medium for the sanctification of the hours and the activity that takes place in the course of them and, therefore, a prayer that should be recited by timing the appropriate canonical hours to coincide with those of the natural day (*SC* 84, 88); the primacy of morning Lauds and Vespers, that, "by the venerable tradition of the universal Church ... are the two hinges on which the daily office turns," and "they are to be considered as the chief hours and are to be celebrated as

such" (*SC* 89a); and the importance of the prayer of the hours in the life and the ministry of priests in the care of souls (*SC* 86 and 90).

Another important conciliar modification is the suppression of Prime (double Lauds). This change creates the possibility of an out-of-choir recitation of the three minor hours and therefore the freedom to choose the one that is best suited to the hour of the day. Matins is then reconverted into a morning hour without ruling out altogether the character of night praise, though, but with fewer psalms and more readings (*SC* 89).

However, *Sacrosanctum Concilium* left a very important issue unresolved, namely, the baptismal ecclesiality of the office; that is, the fact that the ecclesial character of the office does not depend exclusively or primarily on a deputation granted by the legitimate authority of the Church, but of the very nature of the Church as the people of God. Without question, the Council expanded the presupposition that was in effect until then, thus turning the office recited by those having a Church "deputation" into an ecclesial prayer (*Sacrosanctum Concilium* 84); but it left for further doctrinal refinements any consideration of all those baptized as deputies for office recitation, owing to their being a part of the Mystical Body of Christ, which—insofar as it is a Body—is called upon to continue the song of praise introduced on earth by its Head.

This issue was resurrected years later by the General Instruction of the Liturgy of the Hours, which insisted time and again that the divine office is the recitation of the entire people of God and the whole community of those baptized. Thus, the deputation changes its sign, for it becomes theological and not juridical, although the latter designation is not excluded, as it is so stated and ratified by said Instruction.

The current Code contains the basic premises of the original Instruction, as shown by its own significant title: "The Liturgy of the Hours." It recovers the ecclesial character of the office (c. 1173), which implies an invitation to the faithful to take part in it (c. 1174 § 2), although the moral obligation to do so should only be binding for clerics and members of institutes of consecrated life and of societies of apostolic life, in accordance with their constitutions (c. 1174 § 1). The veritas horarum, which explains the recommendation of reciting the offices in the natural course of each hour, have been revived (c. 1175). The gradualness of the hours has been restored since primacy is granted to Lauds and Vespers. The Code has therefore taken a qualitative step of vital importance for the life of the Church and for the renovation of recitation by the secular clergy and the faithful.

1173 **Ecclesia, sacerdotale munus Christi adimplens, liturgiam horarum celebrat, qua Deum ad populum suum loquentem audiens et memoriam mysterii salutis agens, Ipsum sine intermissione, cantu et oratione, laudat atque interpellat pro totius mundi salute.**

In fulfillment of the priestly office of Christ, the Church celebrates the liturgy of the hours, wherein it listens to God speaking to his people and recalls the mystery of salvation. In this way, the Church praises God without ceasing, in song and prayer, and it intercedes with him for the salvation of the whole world.

SOURCES: *MD* III; *SC* 83, 84; PAULUS PP. VI, Ap. Const. *Laudis canticum,* 1 nov. 1970, 8 (*AAS* 63 [1971] 531–532); GILH 6, 7

CROSS REFERENCES: cc. 1174, 1175

COMMENTARY

José Antonio Abad

This canon deals directly with the nature and dimensions of the liturgy of the hours, taking as its point of reference *Sacrosanctum Concilium* 83—it is quoted almost literally—and *Sacrosanctum Concilium* 7; it implicitly accounts for their importance in the life of the Church.

Above all, the text asserts the *liturgical* character of the liturgy of the hours, as it is defined through a now classic statement that the Constitution *Sacrosanctum Concilium* (*SC* 7) employs, as had the Encyclical *Mediator Dei* previously, in order to clarify the nature of the liturgy; in it, Jesus Christ exercises his priestly function. Since it is an act of Christ the Priest, it is also an act of the Church, for He always associates it with himself as Spouse in liturgical actions. The Church is understood to be a baptismal community rather than a *hierarchical* reality—although the latter is not excluded—which implies that the liturgy of the hours is not a specific recitation of clerics but a recitation *proper to all the people of God.* In other words, the subject who celebrates the liturgy of the hours is the Church in so far as the baptismal community is concerned. This lesson contains two implicit consequences, upon which the recent magisterium has insisted, especially the Council Constitution and the General Instruction of the Liturgy of the Hours: that the celebration of the liturgy of the hours should of itself be common (*SC* 84; GILH *passim*)—not individual or quasi-private—and that its efficacy and importance do not originate from an extrinsic juridical title—the ecclesial *deputation*—but from its own nature, that being a prayer of the whole Christ (see introduction to tit. II: "The Liturgy of the Hours").

The canon later notes the *laudatory and intercessory* dimensions of the liturgy of the hours. In the text one hears clearly the echo of *Sacrosanctum Concilium* 83, wherein it is stated that "The Church ... is ceaselessly engaged in praising the Lord and interceding for the salvation of the entire world." Even if there is no explicit reference to the Eucharist, there is an implicit one, not only because of the cited context—which mentions it expressly—but because the Eucharist is the laudatory prayer par excellence, and it is the originating source and the summit toward which the other ecclesial prayers of praise are directed. This connection between the Eucharist and the liturgy of the hours is important in order to see an extension of the latter in the former, which may require a significant spiritual assistance for the Mass to be, in fact, the center of the spiritual and apostolic life of Christians.

Nonetheless, the canon points out what the *theological basis* of the liturgy of the hours' praise is: the proclamation and updating of the salvific Mystery, which is brought about by listening to the word of God who speaks to his people and the anamnesis of salvation. The celebration of the salvific Mystery is not only founded on and demands thanksgiving, but it is also an inexhaustible wellspring wherefrom the creative waters of the new life in Christ flow; it is to this life that all people are destined. This is why, apart from praising God incessantly, the liturgy of the hours prays for the salvation of all, so that the redeeming grace may reach all. Thus, the liturgy of the hours becomes a most effective means for the pastoral and evangelizing action of the Church.

Finally, it is worthy of note that the canon employs the title of "liturgy of the hours," following the Constitution *Laudis canticum*[1] and the General Instruction of the Liturgy of the Hours,[2] instead of the classical term "divine office," which appears in the *Sacrosanctum Concilium*. This is not merely a terminological issue; it also has theological connotations since it alludes to the fact that praise and intercession are intended to sanctify time (the various hours of the day). It even intimates what it will say later on (c. 1175; see commentary): that, where possible, the truth of the hours should be observed, celebrating them at the time of the day that nature requires for each hour.

This canon is very rich in content, and it constitutes a major innovation with respect to *CIC*/1917, which, in addition to limiting itself to providing for the moral obligation only, considered the divine office as a prayer only proper to some clerics and religious persons (cf. cc. 133 and 610 *CIC*/1917).

1. *AAS* 63 (1971), pp. 527–531.
2. This *Instructio*, which serves as a general introduction to the Liturgy of the Hours, can be found in the first volume of the *Liturgia Horarum*, published by Paul VI (Typis polyglottis Vaticanis 1971).

1174 **§ 1. Obligatione liturgiae horarum persolvendae adstringuntur clerici, ad normam can. 276, § 2, n. 3; sodales vero institutorum vitae consecratae necnon societatum vitae apostolicae, ad normam suarum constitutionum.**

§ 2. Ad participandam liturgiam horarum, utpote actionem Ecclesiae, etiam ceteri christifideles, pro adiunctis, enixe invitantur.

§ 1. Clerics are obliged to recite the liturgy of the hours, in accordance with can. 276 § 2 n. 3; members of institutes of consecrated life and of societies of apostolic life are obliged in accordance with their constitutions.

§ 2. Others also of Christ's faithful are earnestly invited, according to circumstances, to take part in the liturgy of the hours as an action of the Church.

SOURCES: § 1: cc. 135, 413 §§ 1 et 2; 610 §§ 1 et 3; 679 § 1; *MD* III; *Rubricae Breviarii et Missalis Romani*, 26 iul. 1960, 149–157 (*AAS* 52 [1960] 623–625); *SC* 95–98; PAULUS PP. VI, m. p. *Sacram Liturgiam*, 25 ian. 1964, VI–IX (*AAS* 56 [1964] 142–143); *IOe* 78; PAULUS PP. VI, Let. *Sacrificium laudis*, 15 aug. 1966; *ES* II, 20; PAULUS PP. VI, Ap. Const. *Laudis canticum*, 1 nov. 1970, 1, 8 (*AAS* 63 [1971] 529, 534); GILH 20–26, 28–32; *SCDW Notif.*, 6 aug. 1972 (*Notitiae*, 8 [1972] 254–258)
§ 2: *MD* III; *SC* 100; PAULUS PP. VI, Ap. Const. *Laudis canticum*, 1 nov. 1970, 1, 8 (*AAS* 63 [1971] 529, 534); *SCDW* Decr. *Cum editio*, 2 feb. 1971; GILH 21–23, 27, 32, 33, 40, 254

CROSS REFERENCES: cc. 246, 277, 663, 1173, 1175

COMMENTARY

José Antonio Abad

The canon has two paragraphs that deal respectively with the moral obligation that some members of the Church have to celebrate the liturgy of the hours and of the utmost desirability for the other faithful also do to so, in accordance with their circumstances.

Paragraph 1 distinguishes two points: 1) the subjects affected by the obligation; and 2) the scope of this obligation.

1. As far as subjects are concerned, the canon refers, on the one hand, to those specified in c. 277 § 3 to which it expressly refers (presbyters, deacons aspiring to the priesthood, and permanent deacons) and, on the other hand, to the members of the institutes of consecrated life (cf. c. 663 § 3) and societies of apostolic life.

2. With respect to the scope of the obligation, the canon just specifies that "obligatione... adstringuntur clerici." In addition, c. 276 § 3 reads: "obligatione tenentur sacerdotes necnon diaconi ad presbyteratum aspirantes cotidie liturgia horarum persolvendi secundum proprios et probatos libros liturgicos."

Is this obligation a) a daily or customary one, b) a substantial or comprehensive one, c) a grave or light one? The text does not resolve these questions, which is why it is necessary to resort to its inspirational sources, the *Sacrosanctum Concilium* 96 and 89, the General Instruction of the Liturgy of the Hours 29–30, and *Ad pascendum.*

a) It is, in the first place, a *daily* obligation, because both the canon and all its sources use the term *cotidie*: "cotidie... obligatione tenentur... oficium persolvendi" (*SC* 96); "*cotidie persolvant*" (GILH, 29); the same is repeated by *AP*, VIII, a; and "obligatione tenentur... cotidie" (c. 276 § 3).

b) In the second place, the obligation extends itself to *the whole office.* All the above-mentioned documents so intimate: "*totum officium*" (*SC* 96); "*integrum eius cursum*" (GILH, 29; cf. *AP*, VIII, a); "liturgiam horarum [the term *integram* or equivalent is understood, because no limit is set and therefore it would be superfluous] secundum proprios et probatos liturgicos libros" (c. 276 § 3).

c) And thirdly, this is a *grave* obligation, at least for Lauds and Vespers, since they should not be omitted "*nisi gravi de causa*" (GILH, 29; cf. *AP*, VIII a).

It is not clear whether this gravity may be extended to the other hours, where the General Instruction of the Liturgy of the Hours uses the expression "*fideliter peragant*" (c. 29) in referring to the Office of Readings. In speaking of the Middle Hours and Compline, it limits itself to recommending them so "melius totum diem sanctificent" (no. 29). It is true that c. 276 speaks of "obligatione tenentur... cotidie liturgiam horarum persolvendi," but it also uses a formula similar to the General Instruction of the Liturgy of the Hours 29: "integrum eius cursum cotidie persolvant." Afterwards, it establishes a different degree of obligation for each hour, not because of its *extension*, but because of its *importance*, referring to the origin of the obligation of reciting Lauds and Vespers: "*sunt veluti cardo*" (*ibidem*). It must be assumed that if the legislator had wanted to modify this obligation, he would have stated so in clearer and more unequivocal terms.

According to this emphasis in the source material, we are of the opinion that the "obligatione liturgiae horarum persolvendi adstringuntur" of the canon we are commenting upon (cf. c. 276 § 3), is to be understood as follows: the obligation is extended to the whole office each day, whereby the omission of any of the hours always implies a moral fault, even if there is no formal disregard for the norm; this fault is a grave one provided that it involves Lauds and Vespers; with respect to the Office of Readings, the gravity would demand omission of it during a relatively broad time period; for the other hours, this period should be even greater.

Apart from the obligation that it imposes on clerics, which is prescribed in order to ensure the continuing celebration of the liturgy of the hours, it is very highly recommended (not ordered) that it be celebrated by all the faithful. The motivation is a consequence of what was stated in the previous canon: "since it is an action of the whole Church." This recommendation is better motivated than in *Sacrosanctum Concilium* itself and is inspired by the Constitution *Laudis canticum* of Paul VI, where the liturgy of the hours is considered as a prayer of the entire people of God (no. 1), without recourse to the ecclesial deputation, as *Sacrosanctum Concilium* would have it (cf. nos. 95–100).

This doctrine was absent from the *CIC*/1917, and it marks a noticeable enrichment.

1175 In liturgia horarum persolvenda, quantum fieri potest, verum tempus servetur uniuscuiusque horae.

In carrying out the liturgy of the hours, each particular hour is, as far as possible, to be recited at the time assigned to it.

SOURCES: SCRit Decl., 28 dec. 1960; IOANNES PP. XXIII, Facul., 17 ian. 1961; *SC* 88, 89, 94; PAULUS PP. VI, Ap. Const. *Laudis canticum*, 1 nov. 1970, 2 (*AAS* 63 [1971] 529); GILH 38, 39, 75, 77, 84, 95

CROSS REFERENCES: cc. 1173, 1174

COMMENTARY

José Antonio Abad

This canon deals with the *veritas horarum* in the celebration of the liturgy of the hours. In this respect, it consists of a traditional and an already classical principle from Vatican II (*SC* 83 and 94), according to which every part of the office must be celebrated in conformity with the natural course of each hour.

The general principle involves a very significant change of perspective, since the divine office is no longer thought of as a prayer that takes a certain amount of time, but as a prayer intended to sanctify the time of each day. This sanctification requires Lauds to be recited during the early hours of the morning, Vespers at dusk, the Office of Readings at any time of the day, the Middle Hours between the ninth and twelfth hours (Terce), the twelfth and the fifteenth hours (Sext), the fifteenth hour and thereafter (None), and Compline to close the day.

However, the *veritas horarum* is a recommendation, not a prescription, so that neither *ad urgendam* nor *ad finiendam obligationem* are applicable. This is what follows from the canonical formula) that conforms to *Sacrosanctum Concilium* 88: "in quantum fieri potest," and the General Instruction of the Liturgy of the Hours 29: "Horarum veritate, quantum fieri potest, servata." There appears to be no solid ground, then, to the opinion of those who argue that the *veritas horarum* implies the cessation of the obligation regarding the hour that could not be celebrated at a congruous time, which is understood to be the time that substantially concurs with the real time of each canonical hour. Undoubtedly, the *veritas horarum* is a dimension of the liturgy of the hours, but it is not the only one; moreover, the praise and entreaty that the entire Mystical Body of

Christ—Head and members—offers as a tribute to the Father, are not voided by the circumstances of time.

Consequently, whoever conducts the liturgy of the hours during the day fulfills the obligation of celebrating it, even if he or she may not keep the *veritas horarum*; the latter, however, is extremely recommended, both due to the very nature of things and the mind of the Church.

Obviously, the doctrine of this canon was not available in the *CIC*/1917, since its philosophy of the divine office prescinded completely from the sanctification of time.

TITULUS III
De exequiis ecclesiasticis

TITLE III
Church Funerals

INTRODUCTION

José Luis Santos

1. *The canonical norm*

The canonical norm on funerals relies on their Christian significance, which we will discuss below. Both the initial norm and the rest that follow, a dozen canons, expressly note this intent.

Apart from the respective canons of the *CIC* (cc. 1176–1185) and those pertaining to the *CIC*/1917 (cc. 1203–1242), various documents of the Second Vatican Council, such as the Rite of Funerals, the Pastoral Directory for Bishops EcclesiaeImago, and other provisions of the congregations, especially those of the Congregation for the Doctrine of the Faith can be mentioned as major sources of legislation on this subject.

The sense of improvement in this legislative process refers, among other aspects, to the inclusion of elements that are conducive to fostering that Christian sense with respect to the people and the very funeral rites, as it dispenses from others that are less proper to its theological and pastoral sense.

Worthy of note are some general significant features, especially as they relate to a) the particular legislation and b) the uniform and simple manner in which the legislator has proceeded on these norms.

a) It is particularly interesting to note that the universal legislator respects and values particular legislators, bishops and bishops' conferences through the *CIC*, as well as the particular customs of peoples in respect to this subject. It insists time and again on various norms safeguarding the particular law, whether by directly appealing to it (place of funerals, c. 1177; register entry, c. 1182), or by referring to the criterion of the local ordinary or the bishops' conference (funerals of non-Catholics, c. 1183; denial of burial, c.1184; offerings made on occasion of funerals, c. 1181).

This one reference was deliberately foreseen by the Council (*SC* 81) when it indicated the desire that "Funeral rites should express more clearly the paschal character of Christian death, and should correspond more closely to the circumstances and traditions found in various regions."

In endorsing this desire of the Council, just as the *CIC* does, the funeral rite shows a more detailed interest in the observance of customs in a local region (no. 2). As far as possible, it proposes various funeral options according to countries and alluding to and abiding by the criterion and norms of the bishops' conferences (nos. 4–9). When adapting the rite to the new local needs and characteristics, it also suggests looking at the advisability of modifying or even eliminating certain rites (such as aspersion, incensing, liturgical color), if they are not in harmony with the customs of the peoples in the local area (nos. 21, 22).

b) The *CIC* provisions on this matter also include other features that introduce a new assessment of the whole norm.[1] They drastically reduce the number of *CIC*/1917 norms (from forty canons to just ten); they involve the removal of privileged and discriminatory situations; and they include a significant simplification of the norms themselves. Aside from imparting a more Christian sense to ecclesiastical funerals, the legislator is intent on providing a more uniform and simple normative structure consistent with the theological and pastoral feelings of the faithful, leaving to the good judgment of those in charge quite a fewdecisions and eliminating the CIC/1917's prior thoroughness, due to its lack of currency and usefulness (e.g., all the previous detailed case law in terms of classes of funerals, funeral minister, parish portion, differentiation among the faithful according to status, etc.).

2. *Theological foundation*

While funerals follow in part the universal practice of the worship of the deceased by the people, the Christian reason for funerals is understood as an added testimony of religious faith that stems from a theological basis and is expressed liturgically and under canonical norms.

The universal human view on death has left a permanent imprint in the history of the peoples of the earth in terms of the treatment of respect

1. Cf. commentary on cc. 1176–1185, in *Salamanca Com;* J.T. MARTÍN DE AGAR, commentary on cc. 1176–1185, in *Pamplona Com;* S. ALONSO, commentary on cc. 1203–1238, in *Código de Derecho Canónico* (Madrid 1980); RF, 1421–1447; J. MANZANARES-A. MOSTAZA-J.L. SANTOS, *Nuevo Derecho Parroquial* (Madrid 1988), pp. 549–556 and 561–563; E. FERNÁNDEZ REGATILLO, *Derecho Parroquial,* (Santander 1951), pp. 401–462; *Comentarios al Código de Derecho Canónico,* II (Madrid 1963), pp. 788–843; F. BLANCO NÁJERA, *Derecho funeral* (Madrid 1930).

and importance in the meaning of funeral rites. Biblical narratives are pervaded with this intent from the cult of death and the burial of patriarchs and prophets down to the faithful and the deceased in general; an eminent testimony of this universal respect is also the veneration brought about by the death of Christ in historical time and subsequently in the continuing worship in Jerusalem.

According to the doctrine of Christ himself, as conveyed by the Apostles and tradition and in accordance with the interpretation of the magisterium of the Church, the Christian faith tries to offer a response from the divine faith to this universal question of man.

To this end, it is illuminating to read the text of the Second Vatican Council on the mystery of death based on the texts of Revelation: "Christ won this victory when he rose to life, for by his death he freed man from death" (*GS* 18). Further on, he adds: "It is therefore through Christ, and in Christ, that light is thrown on the riddle of suffering and death which, apart from his Gospel, overwhelms us. Christ has risen again, destroying death by his death, and has given life abundantly to us" (*GS* 22).[2]

3. *Liturgical expression*

The Christian liturgical rite and the canonical norm on funerals are grounded in such substantive transcendence. Indeed, the funeral rite denotes a deliberate interest in having "Christian funerals manifest Paschal faith and true evangelical spirit" (no. 2). It also encourages the Christian community to be in communion with the deceased members, and to offer their prayers from the two perspectives of spiritual assistance for the deceased and comfort of hope for those who stay in this life, thereby affirming faith in everlasting life.

The liturgical elements are designed to serve this purpose, and they include the most significant functions, such as the Eucharist, the readings of the word of God, psalms and other prayers, and the last farewell from the Christian community to one of its members (nos. 10–15).

Also serving this same purpose are the pastoral recommendations to the relatives of the deceased, to the Christian community and the church ministers, and in particular to the priest responsible for the celebration of the funerals (nos. 23–35).

2. Cf. *LG*, 7; *SC*, 5, 6, 32, 81, 82; *GS*, 18 and 22. In Sacred Scripture: 2 Mc 12: 43; Lk 23: 46; Jn 11: 25; Jn 6: 51.

1176 **§ 1. Christifideles defuncti exequiis ecclesiasticis ad normam iuris donandi sunt.**

§ 2. Exequiae ecclesiasticae, quibus Ecclesia defunctis spiritualem opem impetrat eorumque corpora honorat ac simul vivis spei solacium affert, celebrandae sunt ad normam legum liturgicarum.

§ 3. Enixe commendat Ecclesia, ut pia consuetudo defunctorum corpora sepeliendi servetur; non tamen prohibet cremationem, nisi ob rationes christianae doctrinae contrarias electa fuerit.

§ 1. Christ's faithful who have died are to be given a Church funeral according to the norms of law.

§ 2. Church funerals are to be celebrated according to the norms of the liturgical books. In these funeral rites the Church prays for the spiritual support of the dead, it honours their bodies, and at the same time it brings to the living the comfort of hope.

§ 3. The Church earnestly recommends that the pious custom of burial be retained; it does not however forbid cremation, unless this is chosen for reasons which are contrary to Christian teaching.

SOURCES: § 1: c. 1239 § 3; SCCouncil Rescr., 12 ian. 1924 (*AAS* 16 [1924] 189)
§ 2: c. 1215; SCCouncil Rescr., 12 ian. 1924 (*AAS* 16 [1924] 189–190); *SCDW* Decr. *Ritibus exsequiarum,* 15 aug. 1969; GIRM 335; OEx 1–3
§ 3: c. 1203; SCCouncil Resp., 16 ian. 1920; SCHO Resp., 23 feb. 1926; SCHO Instr. *Cadaverum cremationis,* 19 iun. 1926 (*AAS* 18 [1926] 282–283); SCHO Instr. *De cadaverum crematione,* 5 iul. 1963 (*AAS* 56 (1964) 822–823); SCPF Resp., 7 mar. 1967; OEx 15; SCSDW Resp., ian. 1977

CROSS REFERENCES: cc. 529, 530,5°, 837

COMMENTARY

José Luis Santos

1. *Church funerals*

Church funerals are understood to be the celebration of the sacred rites and prayers established by the Church to implore spiritual assistance for the deceased faithful on the occasion of their death. They are

considered to be not private actions but liturgical actions of the Church (cf. c. 837).

Canon 1176 § 2 establishes their meaning in a more specific manner: spiritual assistance for the deceased, honor to their memory and body, and the consolation of the living. For its part, the *Ordo Exequiarum* adds other specific refinements: it inculcates the communion of all members of Christ by the Eucharist and through prayers and petitions; it establishes the principal funeral elements referred to above, namely, the Eucharist, the readings of the word of God, prayers, psalms, final commendation, and farewell from the Christian community to one of its members; it also specifies the three possible places or "stations" for the celebration of rite, to wit, the house, the church, and the graveyard.

The text of the canon and the funeral liturgy inculcate the desire *that the funerals manifest* personal faith and the true evangelical spirit, that, upon honoring the bodies of the deceased as shrines of the Holy Spirit, we set aside all vain ostentation, and that, insofar as they are a prayer for the deceased, these rites should affirm faith in everlasting life (cf. RF, nos. 1–3).

According to the Commission for the Revision of the Code, the title of *funerals* is considered to be equivalent to the concept of church burial in the *CIC*/1917 (a specific type of burial, not merely putting the person in the ground), but the title of *funerals* was preferred instead of burial, because the meaning of the former is broader than the meaning of the latter, and because it transcends in a clearer manner the mere circumstance of place.[1] However, according to customary form, the expression *funerals* or *funeral* is used as an equivalent.

2. *Right, duty*

Apart from its theological and pastoral meaning, the juridical nature of funerals is obvious, not only because of this set of canonical norms that regulate them (cc. 1176–1185), but also because of the so-called explicit reference by the legislator to the juridical order with the use of expressions prescribed in this first canon: "according to law" and "according to the liturgical norms."

This canon declares funerals as a right of the faithful and an obligation of the Church, according to each one's responsibility. The reason for this right and obligation lies in Christian communion, that is, in the participation of the faithful in the life of and the assistance they render to the Christian community. It is logical for the Church to feel responsible for that spiritual assistance. That is why it provides for the funerals of the

1. *Comm.* 13 (1980), pp. 345–346.

deceased faithful, just as it establishes sacraments and sacramentals to assist the living. Hence the expression of an imperative character (*donandi sunt*—they are to be given), whereby the legislator declares both the obligation of celebrating these rites and the right for them to be celebrated. "The canonical law—as stated by the decree of the SC Council—strictly orders that all those baptized be granted church burial, unless they are expressly deprived of it by the law."[2]

Therefore, the faithful, each and every one of them, partake of this right: those baptized in the Church, the catechumens as somehow already members of the Christian community (*baptizati in voto*), and those baptized in other Christian churches if certain circumstances occur (see commentary on c. 1183).

The obligation falls to the relatives or representatives of the deceased faithful to ensure that the funeral is celebrated. It eventually becomes a sort of personal function that is incumbent upon parents, relatives, and the Christian community, in addition to the responsibility of the priest (cf. RF, nos. 16–19).

The most immediate responsibility, however, pertains to the priest, and is derived from the funeral norms, which repeatedly insist on the priestly functions to be performed when celebrating burials: in the interment, and in the inscription of the name in the register (cc. 1177 § 1, 1180 § 1, 1182).

The importance of this responsibility is underscored elsewhere in the *CIC* when it prescribes the special functions of the priest, as it includes "the conducting of funerals" (c. 530), and, indirectly, when it prescribes the common obligations of the priest (c. 529 § 1) "to visit their families, sharing especially in their cares, anxieties and sorrows, comforting them in the Lord," and "to help the sick and especially the dying in great charity, solicitously restoring them with the sacraments and commending their souls to God."

This responsibility includes catechesis on Christian death, the care for the funeral celebration itself, and its harmonization with the pastoral life of the parish (cf. RF, nos. 23–25).

The legislator repeatedly shows a desire that care should be taken in preparing the funeral celebration, with a mindset attuned to the time period and funeral customs in the region, and also mindfulness of family and local traditions, so that human suffering is not denigrated and Christian hope is clearly shown.[3]

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2. SCCouncil, Instr., January 12, 1924, *AAS* 16 (1924), p. 189; cf. *CIC*/1917, cc. 1239 and 1240.
3. Cf. *SC* 81; RF, 2 and 21–22.

3. *Inhumation and cremation*

As indicated in this first canon, canonical discipline still favors the preservation of the tradition of burying the dead body, but it admits cremation without reticence, unless this is chosen for reasons that are contrary to Christian teaching.

Inhumation is encouraged for reasons of religious symbolism,[4] as well as out of accommodation to the Biblical texts,[5] and due to the very strength of the long-standing Christian tradition.[6]

Cremation or incineration is currently admitted by the Church, so the prior opposing discipline is thus repealed. Its admission does not require a special reason to choose it and responds to a legally authorized practice and an increasingly more common custom, which is owing to reasons of a public or private character, such as sanitary, financial or other reasons that have in themselves nothing to do with religious reasons.

This is why, by virtue of the Instruction *Piam et constantem,*[7] the Sacred Congregation for the Doctrine of the Faith introduced the new Christian discipline of accepting cremation as a viable option already before the *CIC,* considering that it is neither bad in itself nor in contradiction to Christian dogma, nor in opposition to religion, and taking into consideration that the antireligious meaning that it occasionally acquired in previous times has now virtually disappeared.

For the same reason, both the sacraments and church burial were allowed in due course for the faithful who might express their choice for cremation.

Shortly afterward, Rite of Funerals 15 implemented the new norm, where it ratifies funerals in these cases and authorizes the celebration of the funeral rites, which are usually celebrated at the cemetery chapel, even at times at the same building of cremation. This circumstance was exempted in the previous Instruction in order to note the preference for inhumation.

Based on these canons and the official interpretation recognized by the Commission for the Revision of the Code,[8] the previous discipline contrary to cremation that was a long-standing Church tradition was repealed by the existing text. The *CIC*/1917 expressly forbade it and denied the church funeral for such cases; the previous documents of the Holy

4. Cf. *SC* 81: on the paschal character of death; 1 Cor 15, 36.
5. Cf. Deut 2, 1–4 and 23; Job 19, 25; Ezek 39, 11–16; for the burial of Christ: Mt 28, 59–60; Mk 15, 46; Lk 23, 53 and Jn 19, 40: "sicut mos est iudaeis sepelire."
6. Cf. note 10.
7. Cf. *AAS* 56 (1964), pp. 822–823.
8. Cf. *Comm.* 12 (1980), p. 347; SCDF, Instr. *Piam et constantem*..., cit.; RF, 15.

See[9] stated the same position, and so did the Christian testimonies of the early centuries, in which cremation was considered to be an anti-Christian practice; inhumation was then regarded as the standard practice of the Church.[10] Otherwise, the cremation of corpses has been a well-known practice at all times for reasons of war, epidemics and other causes, although in the Western world the practice of cremation has become a more common occurrence only in modern times.

9. Cf. SCHO, Decr., December 15, 1886; ID, Decr. July 27, 1892; idem, Decr., June 19, 1926, *AAS* 18 (1926), p. 282.

10. Cf. TERTULIAN, *De anima*, ch. 51: *PL* 2, 782; EUSEBIUS, *Historia Ecclesiastica*, *Liber* 5, ch. 1: *PG* 20, 407; BONIFACIO VIII, decretal *Detestandae feritatis abusum* in *Extrav. Communes*, L. 3, t. 6, c. 1. A brief synthesis can be found in the commentaries on c. 1176 in *Pamplona Com* and *Salamanca Com*.

CAPUT I
De exequiarum celebratione

CHAPTER I
The Celebration of Funerals

1177 **§ 1. Exequiae pro quolibet fideli defuncto generatim in propriae paroeciae ecclesia celebrari debent.**

§ 2. Fas est autem cuilibet fideli, vel iis quibus fidelis defuncti exequias curare competit, aliam ecclesiam funeris eligere de consensu eius, qui eam regit, et monito defuncti parocho proprio.

§ 3. Si extra propriam paroeciam mors acciderit, neque cadaver ad eam translatum fuerit, neque aliqua ecclesia funeris legitime electa, exequiae celebrentur in ecclesia paroeciae ubi mors accidit, nisi alia iure particulari designata sit.

§ 1. The funeral of any deceased member of the faithful should normally be celebrated in the church of that person's proper parish.

§ 2. However, any member of the faithful, or those in charge of the deceased person's funeral, may choose another church; this requires the consent of whoever is in charge of that church and a notification to the proper parish priest of the deceased.

§ 3. When death has occurred outside the person's proper parish, and the body is not returned there, and another church has not been chosen, the funeral is to be celebrated in the church of the parish where the death occurred, unless another church is determined by particular law.

SOURCES: § 1: cc. 1215, 1216, 1230 §§ 1–5, 7; SCCouncil Resol., 21 apr. 1917 (*AAS* 10 [1918] 138–144); SCCouncil Resol., 2 iun. 1917 (*AAS* 10 [1918] 326–331); CodCom Resp., 16 oct. 1919, 15 (*AAS* 11 [1919] 479); SCCouncil Resol., 9 iul. 1921 (*AAS* 13 [1921] 534–537); SCCouncil Resol., 9 iun. 1923 (*AAS* 17 [1925] 508–510); SCCouncil Resol., 12 ian. 1924 (*AAS* 16 [1924] 189–190); SCCouncil Resol., 24 maii et 15 nov. 1930 (*AAS* 25 [1933] 157); SCCouncil Resol., 4 iul. 1936 (*AAS* 29 [1937]

475); SCCouncil Resol., 9 dec. 1939 (*AAS* 32 [1940] 75–76); SCCouncil Resol., 5 iul. 1941 (*AAS* 34 [1942] 101–103)
§ 2: cc. 1219–1221, 1223–1229 §§ 1 et 2; SCCouncil Resol., 9 iul. 1921 (*AAS* 13 [1921] 535–537); SCCouncil Resol., 12 nov. 1927 (*AAS* 20 [1928] 142–145); SCCouncil Resol., 15 nov. 1930 (*AAS* 25 [1933] 155–157); SCCouncil Resol., 4 iul. 1936 (*AAS* 29 [1937] 475); SCCouncil Resol., 9 dec. 1939 (*AAS* 32 [1940] 75–76); CodCom Resp., 4 ian. 1941 (*AAS* 34 [1942] 101–103)
§ 3: cc. 1216 § 2, 1218, 1230 §§ 1 et 7; SCCouncil Resol., 21 apr. 1917 (*AAS* 10 [1918] 138–144); SCCouncil Resol., 2 iun. 1917 (*AAS* 10 [1918] 326–331); SCCouncil Resol., 9 iun. 1923 (*AAS* 17 [1925] 508–510); SCCouncil Resol., 9 dec. 1939 (*AAS* 32 [1940] 75–76)

CROSS REFERENCES: c. 530

COMMENTARY

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1. *Place of the funeral*

a) *Parochial church*

The appropriate place for the funerals of the faithful is the proper parish of the deceased, even when death takes place outside the parochial territory and the body is transferred to it, as indicated by § 3 of the canon. This is understood to be the proper place because it is in this community of the faithful that the person lived out his or her life. Since this is the person's parochial domicile, the entry of the deceased is registered in this place as being the jurisdictional, pastoral, and administrative purview of the person.

These are the reasons for the *CIC* to indicate the parochial church as the proper place. The prescription is also congruous with the norm that establishes the celebration of funerals as a special function of the parish priest, as is the case with the other Christian assistance provided at the end of life, such as Viaticum, anointing of the sick, and blessing of the dying (c. 530).

b) *Non-parochial church*

It is also possible to celebrate funerals in non-parochial churches, although in that case it is usually regulated by the particular legislation in order to avoid possible inconveniences, whether on account of the

juridical priority of the responsibility of the parish priest, or for administrative reasons, or also for pastoral purpose in gathering the faithful at an especially significant time for relatives and friends of the deceased and for the faithful in general.

While the customary practice is still the celebration in the parochial church, there are nevertheless potential issues that can emerge in relation to hospital centers where death takes place, or with the places and funeral homes where the deceased are kept for vigil or with the proper cemetery chapels. In such cases the particular legislation seeks to provide religious services by authorizing the private celebration of the Eucharist and other intercessory prayers in such centers and chapels, but with the exception of the celebration or funeral service properly speaking, which must be performed in conformity with the general norm, c. 1177 § 1, at the parochial church.[1]

However, even though the text of this canon was carefully drawn up by the Commission for the Revision of the Code in order to ensure simplicity and brevity and leave out the thorough casuistry of the *CIC*/1917,[2] it must be acknowledged that this point is still an issue insofar as people's mobility and the very wide range of places in which people may die will increase the difficulties for the celebration of the funeral in the parish.

c) *In case of doubt*

In case of doubt (raised by the Code Commission) on what particular law is to prevail, whether it should be the domicile of the deceased or the location where death takes place, the answer indicates the possibility of enforcing the existing particular law, and to let the law provide specifically for other possible determinations, without the necessary recourse to the bishops' conference. Otherwise, the same response would also add the well-known principle of *locus regit actum*,[3] which can be applied usefully by analogy.

Should doubt persist, the traditional criterion of the proper parochial church could still be applied as the prevailing norm. This would be the case if there were any doubts about the particular law or about the choice made by the deceased or his or her representatives.[4]

1. Cf., "Normas diocesanas sobre celebración de exequias," *Boletín Oficial del Arzobispado de Barcelona* (1984), p. 225, and (1985), p. 28; "Normas sobre servicio religioso en tanatorios," *Boletín del Arzobispado de Valladolid* (1988), p. 687. Cf. J.L. SANTOS, "Funciones especialmente encomendadas al párroco," in *La parroquia en el nuevo Derecho Canónico* (Salamanca 1991), pp. 73–96.
2. Cf. *Comm.* 12 (1980), p. 351.
3. Cf. *Comm.* 15 (1983), pp. 244–245.
4. Cf. commentary on c. 1217, in *Salamanca Com.*

2. *Right to elect*

This canon also establishes the valid right of all the faithful to elect the funeral church on their own or through their representatives.

The elective choice enjoys preference over other options, otherwise there would hardly be any point in applying it, since there would always be another preferred option within the ones indicated. The legislator wishes to abide by the will of the faithful as far as possible, both in regard to the burial place and the place of the funeral (cc. 1177, 1178, and 1180).[5]

The choice is to be made by the person or by the person's representatives, and it is to be expressed in a credible way, although without any greater requirements than the normal credibility of persons; it is also understood to have been made in a voluntary, uncoerced fashion (c. 1227 of the *CIC*/1917 prescribed nullity for cases of coercion where people had been forced by a church official to choose that official's church).

Lastly, also with respect to this subject, the normative simplicity of the *CIC* is a noteworthy aspect, which stands in contrast with the thorough casuistry of the previous Code on the faithful's ability to choose, on the eligible church, and on other issues that affected even the validity of the election.[6]

3. *Other churches*

The last part of the canon seeks to resolve some of the hypotheses about the site of the funerals:

a) If death takes place outside the proper parish, but the deceased is transferred to it, that parish will still be the parish of the funeral, as was noted earlier.

b) However, if the transfer does not occur, the funeral parish will be the parish where death takes place, pursuant to the stated principle *locus regit actum*. If the deceased had several domiciles, the funeral can be celebrated in any of them.

c) But in any case, as was already noted, the legislator allows for the will of the deceased or of his relatives or representatives, as well as the provisions of the particular law, for that matter, to be observed.

5. Cf. E. Fernández Regatillo, *Derecho parroquial* (Santander 1951), p. 428.
6. Cf. *CIC*/1917, cc. 1216–1227.

1178 **Exequiae Episcopi dioecesani in propria ecclesia cathedrali celebrentur, nisi ipse aliam ecclesiam elegerit.**

The funeral of a diocesan Bishop is to be celebrated in his own cathedral church, unless he himself has chosen another church.

SOURCES: cc. 1219 § 2, 1230 § 6; SCCouncil Resol., 9 dec. 1939 (*AAS* 32 [1940] 76)

CROSS REFERENCES: cc. 368, 381, 1242

COMMENTARY

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This norm makes perfect sense, insofar as it provides for the funerals of bishops to be celebrated in their cathedral church since there they hold office and have a close bond with it as the center of the diocesan community. This is consonant with the provision of c. 1242, which authorizes burial in the church, if it is the burial of the diocesan bishop, including the emeritus, as well as, of course, the Roman Pontiff and the Cardinals, although it is restrictive with respect to the other faithful. Once the burial in the church has been authorized, the church itself is responsible for the celebration of the funeral (c. 1177 § 3).[1]

The restrictive form of c. 1242 leads one to ask about the funerals of other church officials who are not mentioned by this norm, and yet are equated to the diocesan bishop according to law, unless otherwise stated (cc. 381 § 2 and 368), since they preside over other particular churches; namely, the prelate, the territorial abbot, the vicar, the apostolic prefect, and the apostolic administrator. The same question could be asked with regard to the auxiliary and coadjutor bishops, who have not been mentioned in the work of the Commission for the Revision of the Code.[2]

The current practice in these cases usually proceeds with a rather extensive set of criteria, and it is customary practice to authorize the funeral and burial in the proper church, which is a criterion that sometimes is spelled out in particular legislation, as it was also in the previous law.[3] It might be thought that there is a sort of "presumed election," and therefore,

1. Cf. *Comm.* 12 (1980), p. 352; 15 (1983), pp. 348–349.
2. Cf. *Comm.* 12 (1980), p. 349.
3. Cf. *CIC*/1917, cc. 1219–1220.

as in the other cases, the Church would continue to observe the principle of the faithful's will.[4]

A similar procedure is sometimes applied to funerals and burials in the case of the parish priest in his parish, and even in the case of other faithful of outstanding Christian significance for the parochial community. In these cases, logically enough, the appropriate authorization will have to be requested from the diocesan bishop, who may grant a dispensation from the disciplinary law (c. 87).

4. Cf. E. FERNÁNDEZ REGATILLO, *Derecho parroquial* (Santander 1951), pp. 423–424.

1179 **Exequiae religiosorum aut sodalium societatis vitae apostolicae generatim celebrantur in propria ecclesia aut oratorio a Superiore, si institutum aut societas sint clericalia, secus a cappellano.**

Normally, the funerals of religious or of members of a society of apostolic life are to be celebrated in their proper church or oratory: by the Superior, if the institute or society is a clerical one; otherwise, by the chaplain.

SOURCES: cc. 1221, 1222, 1230 § 5; CodCom Resp. IV, 20 iul. 1929 (*AAS* 21 [1929] 573); CodCom Resp. 2, 31 ian. 1942 (*AAS* 34 [1942] 50)

CROSS REFERENCES: cc. 573 ss., 731 ss.

COMMENTARY

José Luis Santos

As far as deceased religious are concerned, this norm provides for two eventualities: the funeral church and the officiating priest for the deceased. There is nothing special to be added on the officiating priest who will be the appropriate superior if the institute or society is a clerical one, or otherwise, the chaplain.

With respect to the funeral place, it establishes the same solution for the situation of members of institutes of consecrated life (cc. 573–730) and for those who belong to societies of apostolic life (cc. 731–746), by designating the church or oratory of the institute or society as the proper place for the funerals in both cases.

This solution is likely to be applicable to members of secular institutes, since their general norms are included in the same section of the *CIC* as other institutes of consecrated life, with no exception being made in c. 1179 with respect to them. That solution notwithstanding, the Commission for the Revision of the Code deliberately chose not mention secular institutes, once the question of their inclusion was raised, because some thought that the members of these institutes would follow the general norm established for the faithful in c. 1177 § 2 on the proper parish and the possible choice of officiants. Yet, no reference is made in the final text to this incident.[1]

1. Cf. *Comm.* 12 (1980), p. 352 15 (1983), p. 245.

The norm here has also been simplified by omitting archaic provisions that would make specific reference to other faithful related to the religious (novices, service staff, cloistered nuns, seminarians, etc.), whose funerals will be celebrated in accordance with the common norms, the particular law, or the free will of persons.[2]

2. Cf. E. FERNÁNDEZ REGATILLO, *Derecho parroquial* (Santander 1951), pp. 424–428.

1180 **§ 1. Si paroecia proprium habeat coemeterium, in eo tumulandi sunt fideles defuncti, nisi aliud coemeterium legitime electum fuerit ab ipso defuncto vel ab iis quibus defuncti sepulturam curare competit.**

§ 2. Omnibus autem licet, nisi iure prohibeantur, eligere coemeterium sepulturae.

§ 1. If a parish has its own cemetery, the deceased faithful are to be buried there, unless another cemetery has lawfully been chosen by the deceased person, or by those in charge of that person's burial.

§ 2. All may, however, choose their cemetery of burial unless prohibited by law from doing so.

SOURCES: § 1: cc. 1228, 1231; SCCouncil Resol., 2 iun. 1917 (*AAS* 10 [1918] 326–331); SCCouncil Resol., 9 iul. 1921 (*AAS* 13 [1921] 535–537); SCCouncil Resol., 12 nov. 1927 (*AAS* 20 [1928] 142–145); SCCouncil Resol., 4 iul. 1936 (*AAS* 29 [1937] 475)
§ 2: cc. 1223, 1224, 1226–1229; SCCouncil Resol., 2 iun. 1917 (*AAS* 10 [1918] 326–331); SCCouncil Resol., 9 iul. 1921 (*AAS* 13 [1921] 535–537); SCCouncil Resol., 12 nov. 1927 (*AAS* 20 [1928] 142–145)

CROSS REFERENCES: cc. 1240–1243

COMMENTARY

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The funeral rite also consists of the celebration of funerals at the cemetery and the place of burial as a distinct "station" of the church.[1] Hence, the inclusion of this norm in this place and its allusion to the proper cemetery of the parish, if there is any. The legislator favors the existence of a parochial cemetery, as well as a cemetery for religious and other ecclesiatical juridical persons, but insists on their sacred significance and dispensing here from the nature of their entitlements (property, usufruct, and other rights) (cc. 1240–1241). Upon formulating these norms, the current difficulties for their retention became evident, and despite the large past and present difficulties, the Commission for the Revision of the Code for this canon chose to remain silent.[2]

1. Cf. RF, 4.
2. Cf. *Comm.* 12 (1980), pp. 352–353.

Concurrent with what is indicated for the funerals, free choice is also evident here. It establishes the possibility for all the faithful to choose the cemetery and the place of burial, and any possible provisions to the contrary are referred to common or particular law. No mention is made of some persons (such as infants or their equivalents in law or the professed religious), who for various reasons lacked the faculty to choose under the previous legislation.[3]

3. Cf. *CIC*/1917, c. 1224.

1181 **Ad oblationes occasione funerum quod attinet, serventur praescripta can. 1264, cauto tamen ne ulla fiat in exequiis personarum acceptio neve pauperes debitis exequiis priventur.**

The provisions of can. 1264 are to be observed in whatever concerns the offerings made on the occasion of funerals. Moreover, care is to be taken that at funerals there is to be no preference of persons, and that the poor are not deprived of a proper funeral.

SOURCES: cc. 1234–1237; SCCouncil Resol., 9 iul. 1921 (*AAS* 13 [1921] 535–537); SCCouncil Resol., 9 iun. 1923 (*AAS* 17 [1925] 508–510); CodCom Resp. II, 6 mar. 1927 (*AAS* 19 [1927] 161); SCCouncil Resol., 24 maii et 15 nov. 1930 (*AAS* 25 [1933] 157); SCCouncil Resol. 5 iul. 1941 (*AAS* 34 [1942] 101–103); SCCouncil Resp., 30 iul. 1953; *SC* 32; OEx 20

CROSS REFERENCES: cc. 222, 531, 551, 848, 1264, 1267

COMMENTARY

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The subject of offerings on occasion of funerals is referred by the legislator to the general rules for offerings on the occasion of the administration of the sacraments and sacramentals (c. 1264). At the same time all discrimination is rejected and provision is made for the free celebration of funerals for those who lack the resources to pay.

1.It speaks of "offerings" rather than "price," since the point is not buying or selling the sacrament or the sacramentals, but helping the church attend to its needs, including the sustenance of its ministers (c. 222 § 1).

For this reason, the 1971 Synod recommends instructing the Christian people on priestly remunerations, in the sense of separating them *from ministerial* acts, especially the sacramental acts.[1]

The above-mentioned c. 1264 designates that the bishops of the ecclesiastical province to establish, if they deem it appropriate, the administrative taxes and the sacramental offerings, and their specific destination.

1. Cf. SYNOD 1971, II, 4, *AAS* 63 (1971), p. 921, in *EV*, IV, no. 1234; *DPMB*, 88; J. MANZANARES, *Nuevo Derecho Parroquial* (Madrid 1988), pp. 130 and 551.

In the diocesan purview, it is incumbent upon the bishop to establish the distribution of offerings by the faithful, including the remuneration of the clergy who perform the corresponding functions.

The offerings of the faithful are in themselves destined to meet the needs of the church and, for this reason, those given to parish priests or vicars will in principle be included in the parochial fund (cc. 531 and 551). In any case, provision is made for the will of the faithful to be observed if these offerings are donated for a specific purpose (c. 1267 § 3).

Otherwise, where the diocesan tax is established, the administration of sacramental acts is to abide by it, and no higher amounts can be levied, except for the possible voluntary donations of the faithful, about which no objection is indicated (c. 848).

Quite a few dioceses have dispensed from the diocesan tax in the ministerial administration, either asking only that the faithful voluntarily contribute whatever offering they may wish, or even doing away with this request when the parochial system of assistance is provided through other means.

Every reference to the so-called "parochial portion" of the long-standing canonical tradition in the previous legislation is omitted in the *CIC*. The parochial portion or tax amount pertaining to the proper parish if the funeral was conducted in a different church, is thus abolished. Its thorough regulation established the amount, sources, and distribution of it, as well as the parochial tax in general.[2]

2. The canonical legislator shows special concern for avoiding all discrimination of persons, as noted in the text of the canon. Pursuant to the Vatican II request, the canon admits, nevertheless, only a special liturgical reference in the celebration of funerals for those who receive the order of priesthood, or those who were vested with authority in public office, and eliminating the possibility that other designations—economic or social—may prevail. As a result, the various classes of funerals that existed in the previous law have been abolished.[3]

3. Finally, the canon also shows special concern for the poor to be cared for in the same manner as the other faithful in terms of spiritual assistance, and particularly so that at the time of their death they do not lack the appropriate funeral rites. This explicit mandate of the *CIC*/1917, which is also reiterated by the *Presbyterorum ordinis*, is contained in various parts of the *CIC* and has come to be regarded as a special obligation for the parish priest.[4]

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2. Cf. *CIC*/1917, cc. 1234–1237; E. FERNÁNDEZ REGATILLO, *Derecho parroquial* (Santander 1951), pp. 445–452; *Comentarios al Código de Derecho Canónico*, II (Madrid 1963), pp. 821–822.
3. Cf. *SC*, 32; *CIC*/1917, 1234.
4. Cf. *CIC*/1917, c. 1235; *PO*, 6; cc. 1181 and 848

1182 **Expleta tumulatione, inscriptio in librum defunctorum fiat ad normam iuris particularis.**

After the burial an entry is to be made in the register of the dead, in accordance with particular law.

SOURCES: c. 1238

CROSS REFERENCES: cc. 877, 895, 1121

COMMENTARY

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The entry in the register of the dead, as in the other cases of sacramental registration (baptism, confirmation, and marriage), is to be done in accord with the particular law, which can require different forms according to the time and place, and even according to the civil law. It is the proper task of the parish priest to register the entry and to obtain the proper information when the funeral is celebrated in a location other than his parish church.

CAPUT II
De iis quibus exequiae ecclesiasticae concedendae sunt aut denegandae

CHAPTER II
Those to Whom Church Funerals are to Be Allowed or Denied

1183 **§ 1. Ad exequias quod attinet, christifidelibus catechumeni accensendi sunt.**

§ 2. Ordinarius loci permittere potest ut parvuli, quos parentes baptizare intendebant quique autem ante baptismum mortui sunt, exequiis ecclesiasticis donentur.

§ 3. Baptizatis alicui Ecclesiae aut communitati ecclesiali non catholicae adscriptis, exequiae ecclesiasticae concedi possunt de prudenti Ordinarii loci iudicio, nisi constet de contraria eorum voluntate et dummodo minister proprius haberi nequeat.

§ 1. As far as funerals are concerned, catechumens are to be reckoned among Christ's faithful.

§ 2. Children whose parents had intended to have them baptised but who died before baptism, may be allowed Church funerals by the local Ordinary.

§ 3. Provided their own minister is not available, baptised persons belonging to a non-Catholic Church or ecclesial community may, in accordance with the prudent judgement of the local Ordinary, be allowed Church funerals unless it is established that they did not wish this.

SOURCES: § 1: c. 1239 § 2; RCIA 18
§ 2: c. 1239 § 2; OEx 82
§ 3: c. 1240 § 1,1°; SCPF Resp., 31 maii et 29 iul. 1922; SCHO Resp., 15 nov. 1941; SCDF Decr. *Accidit in diversis*, 11 iun. 1976 (*AAS* 68 [1976] 621–622)

CROSS REFERENCES: cc. 96, 205, 206, 213, 844, 865, 1176, 1177

COMMENTARY

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The granting of church funerals is understood to be a right of the faithful and a corresponding obligation of those responsible for the granting of that right. The faithful themselves will make sure that no one who is entitled to a church funeral will be deprived ofone. This corresponding right and obligation is clearly derived from cc. 1176 and 1177 (see commentaries).

The legislator also indicates a desire to extend this right to all those who are somehow in communion with the Church, and therefore this canon includes various groups of persons: the faithful, the catechumens, the children of Christian parents who died before being baptized. and non-Catholic Christians under special circumstances.

1. *The faithful*

It is only natural for the faithful to be the first in receiving this spiritual assistance, not only for individual reasons (c. 96), but also for being, or having been, a part of the Church community. The text of c. 1183 starts by stating the right of catechumens and not of the baptized faithful because explicit reference to them has already been made in c. 1176. It was so spelled out by the Commission for the Revision of the Code.[1] It was also established by the title on rights and obligations of the faithful: "Christ's faithful have the right to be assisted by their holy pastors from the spiritual riches of the Church, especially by the word of God and the sacraments" (c. 213). The spiritual assistance of the funeral rites is included in the assistance that the Church grants to Christians in the various vicissitudes of life, from birth to death. The liturgy, for its part, with its various readings, prayers, and psalms, continues to apply this practice to the funeral rites, and, in general, to prayer for the deceased.

2. *Catechumens*

As far as funerals (c. 1183 § 1) are concerned, the fact that they are equated to the faithful corresponds to the proper nature of the catechumen, who is joined by intention to the communion of the Church, and is

1. Cf. *Comm.* 12 (1980), p. 354.

practically considered an integral part of it, at least as far as enjoying possible spiritual benefits prior to receiving baptism.

Proceeding from theological reasons, c. 206 notes that the catechumens moved by the Holy Spirit, wish to, and explicitly request, to be incorporated into the Church and to lead a life guided by the theological virtues of faith, hope, and charity, although they have not yet received baptism.

Even though the person may not be in the specific institution called the "catechumenate" discussed in cc. 851 and 856, it may be noted that this broader catechumen status is considered to be sufficient for spiritual assistance, since upon defining it, the legislator does not speak of the institution, but of the individual's genuine desire and personal will to join the Church. On separate occasion, it also notes that it is appropriate to administer baptism to the catechumen who is in danger of death, even if the "catechumenate" has not been completed ("received"). Therefore, for identical reasons, the funeral rites would also be appropriate in cases of death.

This reasoning corresponds to the most favorable pastoral and juridical treatment given to catechumens in canonical and liturgical texts.[2] It also agrees with the intention of Vatican II to assure that, even if catechumens have not received baptism, "since they are already joined to the Church they are already of the household of Christ and are quite frequently already living a life of faith, hope and charity" (*AG* 14).

3. *Children who have died before being baptized*

The granting of funeral rites to children whose parents wished to baptize them, but who have died before baptism, represents by extension the granting of funeral rites to catechumens, because the will of the parents, especially if they are Christians, will substitute for that of their children and suppose a prior adherence to the Christian faith..

The *Ordo Exequiarum* considers that this celebration "does not prejudge the theological question of the everlasting fate (of the children who have died without baptism), or of the necessity of baptism for salvation. This is a demonstration of maternal solicitude by the Church in consideration of the faith of the parents and of their desire to baptize the child, and a proof of confidence in the kindness and mercy of the Lord."[3]

Otherwise, with respect to the baptism of children who have not yet achieved the use of reason, it is a customary practice for the Church to regard the parental will that substitutes for the faith of the child and guarantees the child's future Christian formation, to be good and sufficient.[4]

2. Cf. RF (regarding catechumens); cc. 206 and 788.
3. Cf. RF, 56.
4. Cf. A. MOSTAZA, *Nuevo Derecho Parroquial* (Madrid 1988), pp. 136–137.

It must be noted that the canon speaks precisely of *Christian funerals* rather than *intercessory prayers*, because the intercessory prayers for the dead are nowhere forbidden, even if the dead are not Christian. What the text authorizes are church funerals. The authorization for intercessory prayer is irrelevant since they do not require any authorization.[5]

4. *Non-Catholic Christians*

Their admission to the church funeral rites is owing to the ecumenical spirit of the Church, which has been shown in the documents of the Second Vatican Council and the proper norms of the *CIC*.[6]

Nevertheless, even though the Christian communion between Catholics and non-Catholics may not be a full communion, the situations of Christian and ecclesial communion do indeed admit a major congruence, furthered by some churches, at least in those things that will not compromise the doctrinal unity, as is the case of the ecclesiastical discipline on funerals and intercessory prayers.

Yet out of respect for the will of persons and the autonomy of the churches, it admits funeral rites in general by authorizing their celebration only in the case where it is not contrary to the will of the person, and when the proper minister is not able to conduct the rites; these are both points that will be appraised in accordance with the prudent judgment of the local ordinary.

As the authors indicate, there are two pitfalls to be avoided on this matter: the harshness of those who are opposed to any concession, and who argue that a sacramental does not fit in those cases of need that call for *communicatio in sacris* (cf. *UR* 8); and an excessive benevolence that does not take into account the lack of full communion, and may even be interpreted as proselytism.[7]

5. Cf. *Comm.* 12 (1980), pp. 354–355; 15 (1983), p. 245.
6. Cf. *UR*, 8; Ecumenical Directory (1967); Instr. *In quibus* (1972); cc. 365, 383, 785, 844.
7. Cf. SCDF, Decr., June 11, 1976; *Comm.* 12 (1980), p. 354; J. MANZANARES, *Nuevo Derecho Parroquial* (Madrid 1988), p. 553.

1184 **§ 1. Exequiis ecclesiasticis privandi sunt, nisi ante mortem aliqua dederint paenitentiae signa:**
1° notorie apostatae, haeretici et schismatici;
2° qui proprii corporis cremationem elegerint ob rationes fidei christianae adversas;
3° alii peccatores manifesti, quibus exequiae ecclesiasticae non sine publico fidelium scandalo concedi possunt.
§ 2. Occurrente aliquo dubio, consulatur loci Ordinarius, cuius iudicio standum est.

§ 1. Church funerals are to be denied to the following, unless they gave some signs of repentance before death:
1° notorious apostates, heretics and schismatics;
2° those who for anti-Christian motives chose that their bodies be cremated;
3° other manifest sinners to whom a Church funeral could not be granted without public scandal to the faithful.
§ 2. If any doubt occurs, the local Ordinary is to be consulted and his judgement followed.

SOURCES: § 1,1°: c. 1240 § 1,1°; SCPF Resp. 2, 31 maii et 29 iul. 1922; SCHO Resp., 15 nov. 1941
§ 1,2°: c. 1240 § 1,5°; SCCouncil Resp. 16 ian. 1920; CodCom Resp. X, 10 dec. 1925 (*AAS* 17 [1925] 583); SCHO Resp., 23 feb. 1926; SCHO Instr. *Cadaverum cremationis*, 19 iun. 1926 (*AAS* 18 [1926] 282–283); SCHO Instr. *De cadaverum crematione*, 5 iul. 1963 (*AAS* 56 [1964] 822–823); OEx 15
§ 1,3°: c. 1240 § 1,6°; SCDF Decr. *Patres Sacrae*, 20 sep. 1973 (*AAS* 65 [1975] 500)
§ 2: c. 1240 § 2; SCHO Resp., 15 nov. 1941; SCDF Decr. *Patres Sacrae*, 20 sep. 1973 (*AAS* 65 [1975] 500)

CROSS REFERENCES: cc. 18, 751, 1352, 1364

COMMENTARY

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1. *Denial of church funeral rites*

Clearly, the denial of church funerals does not preclude the possibility of offering prayers of petition and other prayers on behalf of any deceased person, regardless of whether or not the person was a believer, since the norm refers to church funerals only in a specific sense. Funeral

rites differ from intercessory prayers, which in turn, can always be administered on behalf of any deceased person.

On the other hand, as the authors indicate, this is a delicate subject that involves an exception to the general principle of c. 1176, and is to be interpreted strictly (c. 18). The sensitivity of the Christian people and of the proper legislator favor generosity, and for this reason, the deprivation of church funerals has been removed by the *CIC* from the canonical penalties as being too harsh and ineffective.[1]

The deprivation of funerals responds, on the one hand, to the observance of the will of those baptized who do not wish to remain in communion with the Church, if it is so expressed by them in words or clear attitudes, and, on the other, the doctrinal and disciplinary consistency of the Church.

Any manifestation of repentance is also heeded and respected up to the last moment of life, thus removing the denial when: "they gave some signs of repentance before death," the text says. By way of example, a sign of repentance is understood to be a request for sacramental confession, asking God for forgiveness in an express manner, or other attitudes of religious respect, such as insisting on the Christian formation of their children, etc. In the case of gravely ill persons, the testimony of any reliable witness to those signs will be regarded as sufficient, since this is an attitude that does not cause any harm to third parties.

This interpretation, which was also a norm in the previous legislation, responds to the benign spirit of Vatican II, and in this sense, the SCDF took a stand, before the *CIC*, through the circular *Complures Conferentiae* and the Decree *Patres Sacrae Congregationis* of 1973. This was the Congregation's way of attending to the request made by many bishops and bishops' conferences on behalf of public sinners, thereby agreeing to the possible concession of church burial, despite the prohibition of the then existing c. 1240 in the *CIC*/1917, and especially on behalf of the faithful who had died in circumstances of irregular marriages.[2] In addition, this discipline had also been mitigated by other previous pontifical documents.[3]

However, this grant required the individual to have remained joined to the Church, have given some sign of repentance, and have avoided giving scandal to the faithful. It is added that this scandal can be mitigated mainly by explaining to the faithful the genuine meaning of church burial and recourse to divine mercy, as well as to the reason of the witnessing to faith in the resurrection and making public the signs of repentance that may have been given.

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1. Cf. J. MANZANARES , *Nuevo Derecho Parroquial* (Madrid 1988), p. 565.
2. Cf. SCDF, Circular *Complures Conferentiae,* March 29, 1973 and Decr. *Patres Sacrae Congregationis,* September 20, 1973, in *EV,* IV, nos. 2508 and 2610.
3. Cf. GREGORY XVI, Epist. *Officium,* February 16, 1842, in *Fontes I.C.*, II, p. 499; SCHO, Resp., September 19, 1877, in *Fontes I.C.*, IV, p. 1054; S. ALONSO MORÁN, *Comentarios al Código de Derecho Canónico,* II (Madrid 1963), pp. 834 ff.

2. *Cases of denial of church funeral rites*

Following a prolonged deliberation by the Commission for the Revision of the Code, the current norm prescribes the denial of funerals for the following three specific cases in the canon:

a) When it involves baptized persons who are "notorious apostates, heretics and schismatics." The reason for this assumption is clear, since, by denying totally or in part the Catholic dogma or communion with the Church, and also doing so in a notorious fashion, those persons are in reality expressing their contrary will to having an ecclesiastical funeral. The Church would not do anything but respect the personal will of the baptized or at least the consistency in their Christian life.

It is understood by the doctrine that for this first assumption to occur, there is no need of having a de jure notoriety (definitive juridical decision), but it is enough to have a de facto notoriety (e.g. notorious adherence to a heretical or schismatic sect).[4]

Apostasy, heresy and schism presuppose the persistent will and notoriety in denying church teaching or communion (c. 751), and, on the other hand, are considered to be forms of canonical offenses (c. 1364).

b) The second assumption, "those who for anti-Christian motives chose that their bodies be cremated," is nowadays less common (see commentary on c. 1176), because the cremation of corpses is usually not owing to religious reasons, but to other types of personal, familial, or social reasons, which have nothing to do with or, at least, are not offensive to, religion. Moreover, only in the case of such an express intention that was also publicly notorious or known, would it be appropriate to deny a church funeral, because otherwise the reputation of the deceased could be damaged.[5]

The explicit manifestation of this assumption in the legislative text may be due to the fact that this is a new and further option, but perhaps it could be understood also on the basis of the previous assumption.

c) As far as the third assumption is concerned, "other manifest sinners," two necessary conditions are established for the denial: a manifest sinful situation and the possible public scandal of the faithful if the funeral rites are authorized. Therefore, if there is no scandal, there would be no grounds for denial, just as there would be no grounds if the sinful situation is not a manifest one.

But despite all aforementioned situations, on occasion it is not easy to determine these conditions, and thus a doubtful situation may emerge. Because, on the one hand, the objective sinful situation does not always

4. Cf. J.T. MARTÍN DE AGAR, commentary on c. 1184, in *Pamplona Com.*
5. Cf. ibid.; c. 1352 § 2.

coincide with the subjective conscience of the person, who may be in an irreversible, good-will circumstance and therefore may be unaffected by culpability. And, on the other hand, the cause for the scandal may be mitigated by properly enlightening the faithful.[6]

Thus, in case of doubt, the legislator establishes that there be an appropriate consultation with the ordinary, which is also applicable to the previous assumptions, and the duty to abide by his wishes. This will help relieve the conscience of the parish priest in deciding who are public sinners to whom the funeral rites must be denied.

Other assumptions suggested during the revision work of the *CIC* were not included in the final text because they did not serve any clarifying purpose, but rather served to raise new questions (e.g., notorious excommunication, membership in an association opposed to the Church, a life which is totally opposed to Christian practice). For the same reasons, no mention is made of other allusions to Masonic and atheistic associations, suicide and other cases, which were dealt with in the previous legislation.[7]

Finally, as far as doubtful cases are concerned, let us point out that, apart from what has been quoted above, various statements have been made in the past, which under certain conditions, would resolve situations with a sense of benevolence.[8]

6. Cf. S. ALONSO MORÁN, *Comentarios al Código de Derecho Canónico*, II..., cit., pp. 839–840.

7. Cf. *Comm.* 12 (1980), pp. 355–356.

8. Cf. SCHO, Resp., December 2, 1840, in *Fontes I.C.*, IV, p. 844; SCHO, Resp., July 2, 1878, in *Fontes I.C.*, IV, p. 1056; SCHO, Resp., July 18, 1919, in *AAS* 11 (1919), p. 317; CPI, Resp., July 30, 1934, in *AAS* 26 (1934), p. 494; SCHO, Resp., June 28, 1949, in *AAS* 41 (1949), p. 427.

1185 Excluso ab ecclesiasticis exequiis deneganda quoque est quaelibet Missa exequialis.

Any form of funeral Mass is also to be denied to a person who has been excluded from a Church funeral.

SOURCES: c. 1241

CROSS REFERENCES: c. 901

COMMENTARY

José Luis Santos

The funeral Mass is celebrated as an important part of the funeral rites or the funeral office on the day of death or on the following days. It is not only a significant intercessory prayer on behalf of the deceased, but it also shows the bond of the Christian with the Paschal mystery of Jesus Christ, and therefore with his Death and Resurrection, and is a customary practice throughout the Church.

By virtue of this norm, the legislator denies the funeral Mass in the same cases and for the same reasons that church funeral rites are denied. This undoubtedly involves the funeral Mass or the funeral service that forms an integral part of the funeral rites, as prescribed in *Ordo Exequiarum*. This situation concerns a public celebration of the Mass, but not of the Mass that can be offered privately apart from the funeral. The *CIC* establishes without any particular limitation that the priest may offer the Mass for the living and for the dead (c. 901).

The application of this criterion of public and private Mass (which may be more of a convention than a real distinction) appears consistently in the documentation of the Holy See and in canonical legislation. In 1892, the SCHO authorized a private Mass, but not the public one, as a prayer of intercession on behalf of those to whom church burials were denied because of cremation.[1] In cases of denial of burial, the *CIC*/1917 followed the same criterion by explicitly alluding to the prohibition of "other public funeral offices," after enumerating the funeral Mass; and, in the case of an excommunicated person, participation in public intercession and prayers was denied, but the private Mass was expressly allowed.

1. Cf. SCHO, Resp., July 27, 1892, in *Fontes I.C.*, IV, no. 2258.

Again, in 1976, in a decree on non-Catholic Christians, the Sacred Congregation for the Doctrine of the Faith took for granted that there is nothing against the celebration of private Masses as intercession for the baptized non-Catholic deceased, but rather quite the contrary, as would be the case with any other person whether or not he or she is a believer. As an exception to the norm that was in effect then and still is today, the decree added the authorization for public Masses as a means of intercession for those baptized non-Catholics if the celebration thereof is requested by relatives, friends, or subjects of the deceased, and provided that it is requested for a true religious motive.[2]

The 1976 decree normally would have continued in force until the *CIC* came into effect, but there is no record of it having been renewed. The explanation of motives is still currently valid, without any objection having been made against it, and we are of the view, together with other authors, that it may continue to be applied, until such time as the Holy See gives any indication to the contrary.

2. Cf. SCDF, Decr., *Accidit in diversis*, June 11, 1976, in *EV*, V, nos. 2065–2066.

TITULUS IV
De cultu Sanctorum, sacrarum imaginum et reliquiarum

TITLE IV
The Cult of the Saints, of Sacred Images and of Relics

INTRODUCTION

José Luis Santos

1. *Canonical reasoning*

The canonical norms concerning the cult of the saints, and, by extension, of their images and relics, have proliferated considerably since early Christian times; yet, remarkable restraint and simplicity has been exercised in the *CIC* to reduce them to five canons (cc. 1186–1190).

To be sure, such restraint responds to the purpose of the *CIC* revisers, which is comprised of, at least three clear principles:

— reference of all matters pertaining to the ordering of worship to the liturgical norms and retaining as canonical norms only those that pertain to the good public order of the Church;

— reference of all matters concerning the local norms and customs to particular law and retaining only those that pertain to the universal Church;

— removal of the norms relative to theological doctrine unless they are required for understanding the juridical meaning.[1]

The legislator promotes the veneration and worship of the Virgin Mary and the other saints because he deems it a substantially useful element for the furtherance of the faith and the sanctification of the faithful, as well as a spiritual instructional medium that proposes the exemplary nature of its Christian virtues. Saint Thomas was capable of summarizing the most important reason for this cult in a few lines: "It is obvious that we

1. Cf. *Comm.* 5 (1973), pp. 42–43.

must venerate God's Saints, as members of Christ, children and friends of God and our intercessors. This is why, we must also in their honor venerate their relics with due worship, and especially their bodies, temples and organs of the Holy Spirit, which inhabited them and operated in them, and that through the glorious resurrection, they are to be configured to the body of Christ."[2]

The canonical norm also seeks to emphasize the cult of the saints and of their images and relics as quite reasonable, all the while rejecting the possible corruptions that occur quite often around the "incorrect focusing of its ultimate destination being toward God, the possibility of theological errors, the encouragement of popular belief without a solid grounding, etc."

There is some concern on the part of the legislator that the cultic function be carried out with the guarantees of the greatest authenticity, including "veneration of Saints that actually existed, the correct symbols of their images, the truthfulness of their relics," and for other defects to be avoided, including, among others, the not uncommon and misguided commercialism and zest for profit that may arise around the cult.[3]

With respect to the legislative sources, it is sufficient to refer to the most recent and significant provisions, although the hagiographic history is, as we intimated earlier, fraught with abundant documentation: *CIC*/1917, Vatican II, the Apostolic Exhortations of the most recent pontiffs, as well as the Instructions of the Congregation for Rites and the Congregation for Divine Worship.[4]

2. *Other aspects*

The Church shows constant concern for maintaining the function of cult and Christian formation in the veneration of the saints and their images and relics, despite the opposing historical vicissitudes, including: the tradition of Israel, focused on the worship of God, which avoids cultic images due to the danger of idolatry (Ex 20:4–5: "You shall not make for yourself a graven image ... you shall not bow down to them or serve

2. *S. Th.*, III, q. 25, a. 6.

3. Cf. *Comm.* 12 (1980), p. 372; R. NAZ, "Images," in *Dictionnaire de Droit Canonique,* VI, cols. 1257–1258; idem, *Reliquies*, ibid., VII, cols. 569–574; J. FERRANDO, "Reliquias," in *Gran Enciclopedia Rialp*, XX (Madrid 1981), pp. 32–33.

4. Cf. *CIC*/1917, cc. 1276–1289; CONC. TRID., sess. 25, *De invocatione, veneratione et reliquiis Sanctorum et sacris imaginibus*, in Dz, 984–988; *SC*, 122–130; *LG*, 49–69; mp *Sacram liturgiam,* January 25, 1964, *AAS* 56 (1964), pp. 139–144; SCRit, Instr. *Ad solemnia,* January 12, 1968, *AAS* 60 (1968), p. 602; PAUL VI, Ap. Exhort. *Signum magnum* May 13, 1967, *AAS* 59 (1967), pp. 465–475; *SCDW, Normae circa Patronos constituendos,* March 19, 1973, *AAS* 65 (1973), pp. 276–279; PAUL VI, Ap. Exhort. *Marialis cultus,* February 2, 1974, *AAS* 66 (1974), pp. 113–168.

them"; the iconoclastic movement of the eighth century, which was condemned in the year 754 A.D. by the Synod of Bishops and by the Second Council of Nicea in the year 787 A.D.; the Protestant reformation, with its restrictive tendency in this regard, which was answered, in turn, by the Council of Trent (Sess. 25; De invocatione, veneratione et reliquiis Sanctorum et sacris imaginibus).

This cullt of the saints started in the original Christian communities with the veneration of martyrs, as shown by history with the diffusion of "martyrologies" and the subsequent admiration and veneration of the confessors of the faith, with great faithfulness to the Gospel. Later on, the proposal of the saints as patrons of peoples and institutions became popular, in addition to the encouragement of the beatification and canonization processes of the servants of God proposed as outstanding examples of Christian virtues and as intercessors on behalf the faithful. It is little wonder, then, that the Vatican II's request would be: "The practice of placing sacred images in churches so that they be venerated by the faithful is to be retained. Nevertheless, their number should be moderate and their relative positions should reflect the proper order. For otherwise the Christian people may find them incongruous and they may foster devotion of doubtful orthodoxy."[5] This request had been preceded by the norms of the *CIC*/1917, and they were followed by those of the *CIC*.

In addition to the principal consequence of furthering the piety of the faithful in the prayer of the intercession to the saints and on the imitation of their virtues, a major implication resulting from this cult has been the reproduction of images and other signs that keep the memory alive and bring the presence of the saints symbolically closer.

On the other hand, the proliferation of sacred images and signs has also been an extensive source of cultural and artistic inspiration on things sacred (sculpture, painting, architecture, music and other arts, in the various Romanesque, Gothic, Baroque, and other periods, which have adorned churches and monasteries) that has eventually resulted today in a vast historical-religious and artistic patrimony of inestimable value on behalf of the faithful and of the people who possess it, as well as for the benefit of society in general and of any person, regardless of whether or not that person is a believer.[6]

As indicated in the *CIC*, the Church feels itself responsible for this matter, seeking to protect it carefully.

5. *SC*, 125; cf. *CIC*/1917, cc. 1276–1289; *CIC*, cc. 1186–1189.

6. Cf. R. NAZ, "Images...," cit., J.M. AZCÁRATE, "Imágenes," in *Gran Enciclopedia Rialp*, XII (Madrid 1981), pp. 496–499.

1186 **Ad sanctificationem populi Dei fovendam, Ecclesia peculiari et filiali christifidelium venerationi commendat Beatam Mariam semper Virginem, Dei Matrem, quam Christus hominum omnium Matrem constituit, atque verum et authenticum promovet cultum aliorum Sanctorum, quorum quidem exemplo christifideles aedificantur et intercessione sustentantur.**

To foster the sanctification of the people of God, the Church commends to the special and filial veneration of Christ's faithful the Blessed Mary ever-Virgin, the Mother of God, whom Christ constituted the Mother of all. The Church also promotes the true and authentic cult of the other Saints, by whose example Christ's faithful are edified and by whose intercession they are supported.

SOURCES: cc. 1255, 1276, 1278; *MD* III; PIUS PP. XII, Ap. Const. *Munificentissimus Deus*, 1 nov. 1950 (*AAS* 42 [1950] 753–771); PIUS PP. XII, Enc. *Fulgens corona*, 8 sep. 1953 (*AAS* 45 [1953] 577–592); PIUS PP. XII, Enc. *Ad Caeli Reginam*, 11 oct. 1954 (*AAS* 46 [1954] 625–640); *SC* 103, 104, 111; *LG* 49–69; PAULUS PP. VI, Enc. *Mense maio* 29 apr. 1965 (*AAS* 57 [1965] 353–358); PAULUS PP. VI, Enc. *Christi Matri*, 15 sep. 1965 (*AAS* 58 [1966] 745–749); PAULUS PP. VI, Exhort. Ap. *Signum magnum*, 13 maii 1967 (*AAS* 59 [1967] 465–475); PAULUS PP. VI, Litt. Ap. *Mysterii paschalis*, 14 feb. 1969, II (*AAS* 61 [1969] 224–226); SCRit Normae, 21 mar. 1969, ch. II; *SCDW* Instr. *Calendaria particularia*, 24 iun. 1970 (*AAS* 62 [1970] 651–663); *SCDW* Normae, 19 mar. 1973 (*AAS* 65 [1973] 276–279); PAULUS PP. VI, Exhort. Ap. *Marialis cultus*, 2 feb. 1974 (*AAS* 66 [1974] 113–168)

CROSS REFERENCES: cc. 246, 276, 663, 1246

COMMENTARY

José Luis Santos

1. This norm underscores the basic reason for the veneration and the cult of the Blessed Virgin Mary, which is precisely her unique title of being the Mother of God, whom Christ constituted as Mother of All.[1]

1. Cf. *LG*, 66–67; *CIC*/1917, cc. 1255 and 1276.

According to the conciliar expression (*LG* 66), this is an "altogether singular" cult, which is different from the one offered to the Divine Word, to whom the cult both of Mary and of the saints is ultimately directed, "which always refer to Christ, the source of all truth, sanctity, and devotion" (*LG* 67), and on the other hand, it also differs from tribute to the saints, insofar as Mary is the human creature closest to Christ, owing to that singular maternal bond (*latria, hyperdulia, dulia*[2]).

The *CIC* specifies the reason for this cult, without adding any further particulars, but, by Christian logic, this line of thinking includes the development of a genuine faith, while at the same time excludes any barren sentimentality or vain religiosity, as noted by *Lumen gentium*, following other norms established by previous councils.[3]

The expression of this cult, especially since Ephesus, has become manifest in the deep-rooted veneration of the Christian people for the Virgin Mary, to whom they have dedicated shrines, invocations, images in the whole gamut of the arts, associations and patronages, in addition to the liturgical cult that the Church has created and furthered as a testimony of "veneration and love, invocation and imitation" (*LG* 66; cf. cc. 246, 276, 663 and 1246).

2. On the other hand, the cult of the saints, which is also promoted by this same canon, is meant to emphasize the communion between the faithful who are on their pilgrimage in this world with the faithful who have already passed from this life and who provided Christian testimony by their virtues and their example, as Vatican II indicates, thus confirming in turn the decrees of other previous councils.[4]

The Christian people feel themselves called to the veneration and invocation of saints, because, although human, they have shown their faith in Christ by dedicating their lives to martyrdom or by way of their proven virtues; they shine as examples and appear as intercessors before God. Just like the cult of the Virgin Mary, this cult of the saints, in its genuine expression, cannot but have Christ himself as its ultimate end and final destiny (*LG* 50).

Both cults consist of their invocation as "patrons" of associations, activities and other institutions, forming a closer bond by their intercession. This subject of patrons was omitted here by the writers of the *CIC*, because they understood their importance to be more of a liturgical than a juridical nature.[5]

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2. Cf. *CIC*/1917, c. 1255.
3. Cf. II CONC. NICEN., act. 7, in Dz. 302; CONC. TRID., sess. 25, *De invocatione, veneratione et reliquiis Sanctorum et sacris imaginibus*, in Dz.-Sch. 984–988.
4. Cf. previous note; CONC. FLOREN., *Decretum pro Graecis*, in Dz.-Sch. 693.
5. Cf. SCDW, *Normae circa Patronos constituendos*, March 19, 1973, in *AAS* 65 (1973), pp. 276–279; *Comm.* 5 (1973), p. 44.

1187 Cultu publico eos tantum Dei servos venerari licet, qui auctoritate Ecclesiae in album Sanctorum vel Beatorum relati sint.

Only those servants of God may be venerated by public cult who have been numbered by ecclesiastical authority among the Saints or the Blessed.

SOURCES: c. 1277

CROSS REFERENCES: c. 834

COMMENTARY

José Luis Santos

This norm authorizes public cult in the veneration of the servants of God who have been declared as saints and the blessed by the Church. Concerning public worship, c. 834 § 2 says: "This worship takes place when it is offered in the name of the Church, by persons lawfully deputed and through actions approved by ecclesiastical authority." In the opposite case it is called private worship. This is the same notion of the *CIC*/1917 that has been retained by the Commission for the Revision of the Code, except for small finishing touches.[1]

The public worship as such is understood to be invocation with public prayers, the liturgical offering of divine office and proper Mass, the declaration of feast days, authorized dedication of churches and altars, and authorization of their images in the churches, etc.[2]

The declaration of the saints and the blessed, their canonization and beatification, has been subject gradually to a clearer evaluation of the Christian virtues, both theological and cardinal, as well as other qualities of the life of faith, ultimately highlighting, of course, the supreme testimony of martyrdom. The canonization and beatification process, which is contained in the *CIC*/1917, has been taken out of the *CIC* and, once

1. Cf. *Comm.* 5 (1973), p. 43.
2. Cf. S. ALONSO, commentary on c. 1256, in *Código de Derecho Canónico* (Madrid 1980); *Comentarios al Código de Derecho Canónico*, IV (Madrid 1964), p. 4.

revised, has been published as an independent norm (see commentary on c. 1403).[3]

Otherwise, the difference between the cult of the saints and of the blessed is left to liturgical law, since it was not found appropriate here to specify its liturgical or theological nature.[4]

3. Cf. *CIC*/1917, *Liber* IV, pt. II, *De causis beatificationis Servorum Dei et canonizatione beatorum*, cc. 1999–2141; mp *Sanctitas clarior*, *AAS* 61 (1969), pp. 149–153; Ap. Const. *Divinus perfectionis Magister*, January 25, 1983, *AAS* 75 (1983), pp. 349–355; *Normae servandae in inquisitionibus ab Episcopis faciendae in causis Sanctorum*, *AAS* 75 (1983), pp. 396–403; Decr. General *De servorum Dei causis*, *AAS* 75 (1983), pp. 403–404.

4. Cf. *Comm.* 5 (1973), p. 44 12 (1980), pp. 372–373.

1188 **Firma maneat praxis in ecclesiis sacras imagines fidelium venerationi proponendi; attamen moderato numero et congruo ordine exponantur, ne populi christiani admiratio excitetur, neve devotioni minus rectae ansa praebeatur.**

The practice of exposing sacred images in churches for the veneration of the faithful is to be retained. However, these images are to be displayed in moderate numbers and in suitable fashion, so that the christian people are not disturbed, nor is occasion given for less than appropriate devotion.

SOURCES: cc. 1276, 1279; *MD* III; SCHO Instr. *Sacrae artis*, 30 iun. 1952 (*AAS* 44 [1952] 542–546); *SC* 111, 125; *LG* 65, 66; GIRM 278; *SCDW* Normae, 25 mar. 1973 (*AAS* 65 [1973] 280–281)

CROSS REFERENCES: cc. 822–832, 838

COMMENTARY

José Luis Santos

This canon reproduces almost literally (*SC* 125), the request by the Council that the practice of exposing sacred images in churches for the veneration of the faithful be retained. It could be stated that they perform the double function of religious cult and instruction on behalf of the faithful, because they make prayer easier and perpetuate the exemplary memory of those who are represented; they are, in the words of Saint Gregory the Great, like "the open book of the people."[1]

The figurative decoration and the cult of images, which was originally a restrained one (see introduction to this tit. IV), and opposed to both pagan idolatry and to Israelite tradition, soon had a noticeable effect on the Christian people. The Tridentine expression, in addition to those of the Synod in the year 754 A.D., and the Second Council of Nicea in the year 787 A.D., reaffirmed the legitimacy of the sacred images: "images are honored, not because they are believed to have something divine or some virtue, or because something should be requested from them …, but in order to honor those who are represented by them."[2]

1. ST. GREGORY THE GREAT, Epistula IX, 105, and XI, 14, in C. KIRCH, *Enchiridion fontium historiae ecclesiasticae antiquae*, 1054.
2. CONC. TRID., sess. 25, in Dz. 986.

Subsequently, this legitimacy has kept the Church on cautious alert in order to avoid falsified images that deface the true Christian sense or give occasion to errors among less well-instructed faithful (e.g., falsified representations of the Holy Trinity, the Virgin Mary, etc.).[3] Since sacred images are in turn logically understood to be congruous with Christian decorum, nothing was indicated on this specific issue, as the previous legislation would certainly have done, just as indications on less artistically valuable images were omitted, insofar as some of these oftentimes do enjoy great devotion, even if they do not excel by virtue of their artistic merit.[4]

The legislation refers this matter to the judgement of the diocesan bishop, in the same way as was done by the *CIC*/1917, within the scope of his competence and in the framework of the norms established on liturgical matters as specified in the preliminary canons of book IV, which are designed to regulate the liturgical life of the diocese, reserving the highest level of regulation to the Holy See (c. 838).[5]

Apart from the evaluation of sacred images, it would be appropriate for this attention and caution to include the editing of printed images that are not in harmony with the sentiment and norms of the Church, the censorship of which was explicitly stated in the previous legislation,[6] and which is understood to be contained implicitly in the *CIC* norms relating to books and publications (cc. 822–832).

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3. Cf. SCHO, Instr., April 8, 1916, *AAS* 8 (1916), p. 146; idem, Instr., March 18, 1928, *AAS* 20 (1928), p. 103.
4. Cf. *CIC*/1917, c. 1279; *Comm.* 12 (1980), p. 373.
5. Cf. *SC*, 124; *Comm.* 12 (1980), p. 373.
6. Cf. *CIC*/1917, cc. 1279, 1385 and 1399,12°.

1189 **Imagines pretiosae, idest vetustate, arte, aut cultu praestantes, in ecclesiis vel oratoriis fidelinm venerationi expositae, si quando reparatione indigeant, numquam restaurentur sine data scripto licentia ab Ordinario; qui, antequam eam concedat, peritos consulat.**

The written permission of the Ordinary is required to restore precious images needing repair: that is, those distinguished by reason of age, art or cult, which are exposed in churches and oratories to the veneration of the faithful. Before giving such permission, the Ordinary is to seek the advice of experts.

SOURCES: c. 1280; *SCCong* Litt. circ., 11 apr. 1971 (*AAS* 63 [1971] 315–317)

CROSS REFERENCES: cc. 1190 § 3, 1283, 1292 et 1293

COMMENTARY

José Luis Santos

The two final norms that pertain to the images and relics of the Saints (cc. 1189 and 1190) no longer refer to their strictly religious sense, but to the administrative caution those responsible for them must have as they proceed to restore or alienate them.

Unlike the previous norm that refers to a religious and spiritual appraisal, the purpose of this norm arises from the special value that images can offer for artistic or devotional reasons.

The written permission of the ordinary and the previous advice from experts are required in two cases in order to meet two assumptions: a) the restoration of "precious" images and b) their alienation (cf. *SC* 126).

a) Precious images are understood to be those that are highly valued by reason of their antiquity or artistic value, in a manner similar to the way in which the legislator understands goods or objects as "precious" (c. 1292 § 2), that is, objects that are precious by reason of their artistic or historical significance, but also because of the cult or veneration dedicated to them, as is the case with the following canon where the same is applicable to relics and images with regard to alienation.

(With respect to the alienation of images and their valuation and authorization, see commentary on c. 1190 and the norms of patrimonial law [cc. 1290–1298]).

1190 **§ 1. Sacras reliquias vendere nefas est.**

§ 2. Insignes reliquiae itemque aliae, quae magna populi veneratione honorantur, nequeunt quoquo modo valide alienari neque perpetuo transferri sine Apostolicae Sedis licentia.

§ 3. Praescriptum § 2 valet etiam pro imaginibus, quae in aliqua ecclesia magna populi veneratione honorantur.

§ 1. It is absolutely wrong to sell sacred relics.

§ 2. Distinguished relics, and others which are held in great veneration by the people, may not validly be in any way alienated nor transferred on a permanent basis, without the permission of the Apostolic See.

§ 3. The provision of § 2 applies to images which are greatly venerated in any church by the people.

SOURCES: § 1: c. 1289 § 1
§ 2: c. 1281
§ 3: c. 1281 § 1; *SC* 126

CROSS REFERENCES: cc. 1290–1298, 1377

COMMENTARY

José Luis Santos

As commentators have noted, the ban on selling relics (§ 1) refers to any of them, regardless of who the owner is. However, §§ 2 and 3 do provide for the transfer or translation to a new owner of images and relics that are ecclesiastical goods. Relics of renown or of great popular devotion, need permission from the Holy See for valid alienation.[1]

Although, strictly speaking, when talking about the saints, it is understood that relics are the saints' own bodies or parts of their bodies, in which case they may rise to the status of renown because of their importance or devotion; however, those objects that were used by the saints are also considered to be relics by extension.

1. Cf. c. 1377; SCCE, Instr., *Doctrina et exemplo*, December 25, 1965, no. 62; R. NAZ, "Reliquies," in *Dictionnaire de Droit Canonique*, VII, cols. 569–574; J.T. MARTÍN DE AGAR, commentary on c. 1190, in *Pamplona Com*; commentary on c. 1190, in *Salamanca Com*.

It is taken as given that the cult surrounding relics should proceed from their authenticity, thus avoiding the many distortions and falsities that have been brought in by people's imagination or by popular religiosity. That is why this common sense norm has been left out of the canon, just as other provisions relating to cult have been omitted, as provided for in previous legislation, because they belong to liturgical rather than juridical norms.[2]

On the other hand, the inclusion of this canon and the previous one particularly reinforces the provisions for the alienation of images and relics, which have been established in general through patrimonial law concerning ecclesiastical goods. As a result of the coverage of patrimonial law, some members of the Commission for the Review of the Code regard this inclusion as less than necessary.[3]

2. Cf. *CIC*/1917, cc. 1281–1289.
3. Cf. *SC* 126; *Comm.* 5 (1973), p. 45.

TITULUS V
De voto et iureiurando

TITLE V
Vows and Oaths

INTRODUCTION

Silvestro Pettinato

1. *The vow and the oath as acts expressive of the virtue of religion. Their placement in the Code among acts of divine worship*

The Code defines a vow as "a deliberate and free promise made to God, concerning some good which is possible and better": such a promise constitutes an obligation of religion for the person who makes it (c. 1191 § 1). The obligation to fulfill what has been corroborated by oath is also associated with the virtue of religion (c. 1220 § 1).

The legislator's attempt to preserve in these two acts their radical character as manifestations of the virtue of religion, from which results the obligation to fulfill what has been promised or sworn, evidences his desire to emphasize the essentially religious nature of such acts, placing them, consequently, in the Code's system in a coherent way, together with the other acts of divine worship.

However, it was precisely during the examination of the second part of the *Schema canonum* "De Ecclesiae munere sanctificandi" which dealt with vows and oaths in title VIII, that some consultors argued that the "De cultu divino" section was not the appropriate place for this matter, and, for this reason, they proposed a different placement: book I, concerned with the general norms, or, in any case, some place other than that which was devoted to sacred places and times, and to divine worship.

The sparse accounts that we have of this discussion indicate that most of the consultors rejected the proposal because vows and oaths have been considered *in tota traditione* as acts of worship.[1] The tradition to which they refer consists of the constant consideration of vows and oaths as acts of the virtue of religion, which is defined as the moral virtue that

1. *Comm.* 12 (1980), pp. 374–375.

leads people to worship God as He deserves,[2] and it is logical that they find their most coherent, systematic place among these acts.

Generally speaking, acts of the virtue of religion can be traced back traditionally, according to their own manner, to the cardinal virtue of justice, which, in turn, is made up of integral parts and potential parts. The former comprise those acts and habits that are necessary for perfect justice, whether it is regarding what is due our neighbor (*iustitia specialis*), or regarding what is due the community and God (*iustitia generalis*) (i.e. to do good and to avoid evil).

The virtue of religion is among the virtues potentially connected with justice. It is only potentially a virtue of justice because humankind, even though it is required to duly worship God, will never be able to worship Him to the extent that *ille meretur*.[3] The fact that virtue of religion may be the potential part of justice, however, does not mean that the virtue is inferior to justice; on the contrary, the virtue of religion is considered to be superior to all other moral virtues, even though it cannot fit perfectly in the concept of justice due to the defective nature of human beings, which means that they are essentially unable to satisfy, according to a criterion of strict equality, their debt with God.

Religion, considered in accordance with its acts, is organized, according to the scheme of Thomas Aquinas' *Summa Theologiae*, as a series of internal acts (devotion, prayer, adoration) and external acts, which can entail the offer of external goods (among which promises are included by means of vows) and taking on divine things (which includes taking on the oath as taking on God's name).

This scheme, which places vows and oaths among the external acts of worship not because the internal dimension does not play an important role in them, but because their specific form leads to external and sensitive works, develops according to a systematic order that constitutes a "model of clarity of exposition,"[4] and that will be later adopted in the treatises of moral theology.

Quaestio 88 of II-II refers, in synthesis, to: the notion of vow, matter, usefulness, the obligation that derives from it, and the capability and dispensation of vows. Analogously, regarding oaths, *Quaestio* 89 deals with the notion, the conditions of legality, the requirements and the obligation resulting from the dispensation.

It is common knowledge that canonical codifications have placed vows and oaths in the part devoted to acts of divine worship. The *CIC*/1917, in part III of book III, title XIX; the *CIC* in part II of book IV, "De Ecclesiae munere sanctificandi," title V (cc. 1191–1204); the *CCEO*, in

2. *S. Th.*, II-II, q. 81, a. 5.
3. D.M. PRÜMMER, *Manuale Theologiae Moralis*, II (Barcelona 1958), pp. 69–70.
4. P. SÉJOURNÉ, "Voeu," in *Dictionnaire de Théologie Catholique*, t. XV, p. II, col. 3298.

chapter VIII, article V of title XVI: "De cultu divino et praesertim de sacramentis."

This systematic option—distancing itself from the *Corpus Iuris Canonici*[5] and from the disperse variety of successive sources—reveals in this matter a tendency to follow the expounding style of the *Summa Theologiae*, a style that is certainly more agreeable with the needs of modern codifying techniques.

2. *Sources for divine positive law and natural law. The authority of the magisterium and ecclesiastical tradition regarding the vow*

If any promise made by an individual to another constitutes an obligation of natural law, the fulfillment of a vow is, certainly, *de lege naturae*, but also *praeceptum legis divinae.*[6]

We can find in the Old Testament numerous references to the practice and the discipline of the vow, including a detailed description of the rite in some cases, such as the vow of the Nazarite. In Numbers 30:30 we read "when a man vows an oath to the Lord, or swears an oath to bind himself by a pledge, he shall not break his word; he shall do according to all that proceeds out of his mouth."

The vow is, in itself, a voluntary act, in the sense that no one is strictly forced to take it: "But if you refrain from vowing, it shall be no sin in you" (Dt 23:22–24). But, once the commitment is taken on, it is necessary not to delay its fulfillment, "for the Lord your God will surely require it of you, and it would be sin in you" (Dt 23:21).

There are references to vows in other parts of the Sacred Scripture that authorize the practice of taking vows, and expressing its goodness and convenience, along with its use as an instrument of praise and thanksgiving, and an invocation in times of trouble (Ps 65:2; 66:13: 115:5 and 9); encouraging the cautious usage of it (Prv 20:25), and requiring the prompt fulfillment of everything that is promised (Eccl 5:3; Is 19:21; and in the New Testament, Acts 18:18).

Christian tradition—which is structured around the two main veins of Greek patristics (which essentially consider vows as an offering-sacrifice), and of Latin patristics (in which, on the contrary, it is the idea of

5. For a review of the passges in the *Corpus Iuris Canonici* concerning the vow and the oath, cf. the entries "iuramentum," "iurare," "iuratio," "iusiurandum," in T. REUTER-G. SILAGI, *Wortkonkordanz zum Decretum Gratiani*, t. 3 (Munich 1990), pp. 2459–2478; and entries "votum" and "vovere," ibid., t. 5, pp. 4947–4951. For the second part of the *Corpus*, cf. a) *X* I, 40; *VI* I, 20: "De iis quae vi metusve causa fiunt"; b) *X* II, 24; *VI* II, 11; *Clem.* II, 9: "De iureiurando"; c) *VI* IV, 7: "De juramento calumniae"; d) *X* III, 34; *VI* III, 15; *Extrav. Io. XXII* III, 6: "De voto et voti redemptione." For both parts of the *Corpus*, cf. X. OCHOA-A. DÍEZ, *Indices canonum, titulorum et capitulorum Corporis Iuris Canonici* (Rome 1964).

6. *S. Th.*, II-II, q. 88, arts. 3 and 10.

the vow-promise what prevails)[7]—has always appreciated the special efficacy of this act of worship, reinstating the need, well noticed in pastoral practice, for the faithful not to take vows frivolously (*a ciancia*[8]), but to be cautious and turn to the advice provided by an expert—spiritual guidance, which could, according to the personal factual circumstances, encourage them to make resolutions of possible observance rather than vows of difficult fulfillment. The reason for this is that even though vows are voluntary acts, once they are made, due to their extraordinary and superrogatory character, they entail an obligation of conscience that is normally grave, a circumstance that was eminently expressed by Gratian, following Jerome's and Augustine's authority in this matter: "Sunt quaedam quae etiam non voventes debemus; quaedam etiam, quae nisi voverimus, non debemus; sed postquam ea Deo promittimus, necessario reddere constringimur."[9]

And the magisterium of the Church has always proclaimed the high moral and ascetic value of the vow in as much as it is a means to honor God (CCC, 2101–2103), and not only regarding private vows, in which the sense of faith of all those who live during a century is diffusely expressed, but also and most of all regarding consecrated life, which, in its diverse forms properly authorized, manifests the act of belonging to the life and to the sanctity of the Church (*LG* 44; c. 574 § 1).

To guard the doctrine of the Church, then, an authoritative intervention has been some times necessary concerning vows. It was aimed at the refutation of the thesis according to which the profession of religious vows would make the person "ineptior et inhabilior ad observationem mandatorum Dei,"[10] and of Lutheran doctrines, for which vows made after the baptism should be considered null, in as much as "in baptismo ipso iam factae," or those that argue that a solemn vow of chastity would not prevent someone from contracting a valid marriage.[11] The same thing can be said of Molinist proposals ("vota de aliquo faciendo sunt perfectionis impeditiva");[12] of the Josephite and Jansenist thesis of the synod of Pistoia

7. P. SÉJOURNÉ, "Voeu," cit., cols. 3187ff; cf. also the studies of H. GREEVEN and J. HERRMANN, in *Grande Lessico del Nuovo Testamento*, III (Brescia 1967), pp. 1209ff and 1234ff.

8. DANTE, *Paradiso*, *C* V, v. 64; P. FEDELE, "Dante e il diritto canonico," in *Ephemerides Iuris Canonici*, (1965), pp. 340ff.

9. C. XVII, q. 1, c. 1. On the controversy regarding vows in mandated matters—*vota necessitatis*—as distinct from those which the text mentions, which are called *vota voluntatis*, cf. P. SÉJOURNÉ, "Voeu," cit., cols. 3212–3215.

10. On the thesis of Wycliffe cf. CONC. CONSTANTIENSE, *Sess. VIII*, in Dz.-Sch., 1171 and 1185; MARTIN V, Const. *Inter cunctas*, in P. GASPARRI, *Codicis Iuris Canonici fontes*, I (Rome 1947), pp. 51ff.

11. CONC. TRID., *Sessio VII*, c. IX; *Sessio XXIV*, c. IX, in MANSI, *Sacrorum Conciliorum nova et amplissima collectio*, vol. 33 (Graz 1961), pp. 54 and 151.

12. INNOCENT XI, Const. *Coelestis Pastor*, in P. GASPARRI, *Codicis Iuris Canonici fontes*, I, cit., p. 482.

that opposed perpetual vows of chastity, poverty, and obedience;[13] and also of all those doctrinal movements, such as the so called Americanism, that consider vows as acts that constrain human freedom and appropriate "ad infirmos animos magis quam ad fortes."[14]

3. *Sources for the divine positive and natural law. The authority of the magisterium and ecclesiastical tradition regarding the oath. Its function in canonical experience*

The Church has had to intervene in the case of oaths also, as it did in the case of vows, to correct errors and to reinstate the legality of an oath made in truth, judgment, and justice,[15] and its intrinsic goodness when divine testimony is invoked to confirm the truth, "sed malum est illi, qui eo male utitur;"[16] or to condemn as "falsa, Ecclesiae iniuriosa, iuris ecclesiastici laesiva, disciplinae per canones inductae, et probatae subversiva" the thesis of the synod of Pistoia, according to which oaths would be an essentially irreligious act contrary to divine precepts.[17]

On the other hand, we cannot say that the difficulties inherent in oaths, both from a dogmatic and from a doctrinal point of view, and from the no less important point of view of practice, have always been dealt with in an absolutely coherent and peaceful way.

It was already stated in the Old Testament (Nm 30:2; Dt 6:13; Is 65:16; Jer 12:16 and, above all, 4:2: "if you swear, 'As the Lord lives,' in truth, in justice, and in uprightness, then nations shall bless themselves in him, and in him shall they glory"), and it was mentioned several times as a personal practice by the Apostle in the Pauline *corpus* (2 Cor 1:23; Rom 1:9; Gal 1:20; Phil 1:8) and also in the Letter to the Hebrews (6:13–18). The oath was considered by Matthew (5:33–37: "Again you have heard that it was said to the men of old, 'You shall not swear falsely, but shall perform to the Lord what you have sworn'...") and by James (5:12) so severely that, taken in its strictly literal sense, it would seem to be an abrupt, decisive, and irreversible point of arrival and closure of the experience of the Old Testament in this matter.

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13. PIUS V, Const. *Auctorem fidei*, in P. GASPARRI, *Codicis Iuris Canonici fontes*, II (Rome 1948), p. 711.
14. LEO XIII. Let. *Testem benevolentiae*, in P. GASPARRI, *Codicis Iuris Canonici fontes*, III, pp. 535ff. A response addressing the various heterodox positions mentioned in the text and the modern trends in philosophy that are rationalist in nature can be found in R. PLUS, "Voeu," in *Dictionnaire apologétique de la foi catholique*, t. IV (Paris 1922), cols. 1930ff; P. SÉJOURNÉ, "Voeu," cit., cols. 3227ff.
15. Regarding the Waldensians, cf. INNOCENT III, Let. "Eius exemplo," in P. GASPARRI, *Codicis Iuris Canonici fontes*, I, pp. 28–29; regarding Wycliffe and Hus, MARTIN V, Const. *Inter cunctas*, ibid., pp. 51 and 53; regarding Quesnel, CLEMENT XI, Const. *Unigenitus*, ibid., p. 540.
16. Regarding the Fraticelli, cf. JOHN XXII, Enc. *Gloriosam Ecclesiam*, ibid., pp. 34–35.
17. PIUS V, Const. *Auctorem fidei*, cit., pp. 682ff, 708.

Certainly, we could find restrictive interpretations of the teachings of Christ in early Christianity, mainly performed by the Greek Fathers, interpretations that developed in two different ways: either toward the condemnation of oaths that were considered as absolutely illicit acts, or toward the condemnation of their inconsiderate usage, in as much as they would be opportunities for perjury, which has always been considered as one of the gravest crimes.

It is necessary to take into account the Latin tradition variant to find the origins of a line of cautious and responsible admission of the legality of oaths--in the diffuse council practice and in the doctrine of the Fathers and ecclesiastical writers--that reached in Ambrose, Jerome and Augustine a definitive clarification, in the sense that, if there is no risk of perjury, an oath can be taken legally, since one does not sin when he swears in truth.

The posterior theological reflection was based on the doctrine of these three Fathers—a doctrine that provided the *auctoritates* on which Gratian based his proposals[18]—that was in turn based on the interpretation of the passages from the New Testament of Matthew and James as the absolute prohibition, not of oaths, but of the abuse that takes place in practice when this act, which should be used in exceptional circumstances, is used frequently and frivolously. This kind of abuse is also foreign and contrary to Christian perfection, which postulates a demanding respect for sincerity, so much so that even resorting to divine testimony to support one's own statements is only justified in extraordinary cases.[19]

We can understand the abundance of theological literature on this matter when considering it from this point of view: it argues for the honesty, or, in other words, the legality of this act of religion, and, simultaneously, warns against the abuses and moral consequences to such an extent that it teaches that oaths "non esse per se appetendum et nimis frequenter adhibendum, cum secus facile irrepant abusus."[20]

18. C. XXII, q. 1, c. 14: "iurare non est peccatum"; q. 2, c. 2: "quod iusiurandum hos habeat comites, veritatem, iudicium, atque iustitiam."

19. J. SCHNEIDER, "Giuramento," in *Grande Lessico...*, cit., t. VIII, cols. 1281ff; M. CALAMARI, "Ricerche sul giuramento nel diritto canonico," I, in *Rivista di Storia del diritto italiano*, (1938), pp. 127ff, with ample textual references; N. IUNG, "Serment," in *Dictionnaire de Théologie Catholique*, t. XIV, p. II, cols. 1945–1946; G.B. GUIZZETTI, "Giuramento," in *Enciclopedia Cattolica*, VI, col. 775; B. GUINDON, *Le serment, son histoire, son caractère sacré* (Ottawa 1957), pp. 93ff; A. ROYO MARÍN, "Juramento," in *Gran Enciclopedia Rialp*, t. XIII, cols. 669–700; A. LA RANA, "Il giuramento nella Chiesa, tra religione e diritto," in *Studi di diritto ecclesiastico e canonico* (Naples 1981), pp. 1ff.

20. D.M. PRÜMMER, *Manuale...*, cit., p. 368; H. NOLDIN, *Summa Theologiae Moralis*, II, *De praeceptis Dei et Ecclesiae* (Innsbruck 1910), p. 255, no. 2; M. ZALBA, in E.F. REGATILLO-M. ZALBA, *Theologiae Moralis Summa*, II, (Madrid 1953), pp. 147–148; G. MAUSBACH-G. ERMECKE, *Teologia morale*, II (Alba 1957), pp. 281ff.

Oaths present, on the other hand, a broad range of uses in the Latin Church, both in private relations and in institutional life, and perform an important function—just to remind us of the aspects that can be of a more immediate interest and to mention a historical memory that is also somehow reflected in current discipline—that of appearing as one of the instruments more profitably used to overcome the rigid Roman formalism of the *ius civile.*

I am talking, in general terms, about the so-called simple pacts, and more specifically to the promissory oath, a vicissitude of great interest, in which canon law, in the age of its greatest splendor, managed to provide an *ingénieuse et savante* construction.[21]

Regarding oaths, in particular, a theory gradually developed that acknowledged—although not without doubts—in its confirmatory mode, a sanatory force of the affair and of the act to which it was attached, when the former was considered invalid by secular and canonical positive law: this was the case, for instance, in matters of usurious interests, of prohibition of alienation of dowry goods, of inheritance pacts, and of donations between spouses.[22]

Oaths lost this extraordinarily significant function long ago, and while this institution goes through a serious crisis in institutional vicissitudes of contemporary, civil society—where it is frequently considered as an anachronistic interference in the dualist configuration of temporal and spiritual realities and is gradually losing its peculiar religious essence to acquire the unusual connotations of "lay oath"[23]—the Church has intervened to reinstate the proper magisterium and to discipline in its own ambit only that which is really essential and which cannot be waived (cf. CCC, 2150–2155). An oath, as it has always been understood, is an act of religion that entails a grave moral obligation and which, in the canonical system, is assigned to specific applications—in the ordinary and special procedural law, even in the occasional assumption of public functions, in the acts with which a promise or a pact is intended to be

21. A. ESMEIN, "Le serment promissoire dans le droit canonique," in *Nouvelle Revue d'histoire du droit français et étranger,* (1888), p. 251; cf., moreover, R. NAZ, "Serment promissoire," in *Dictionnaire de droit canonique,* t. VII, cols. 993ff; F. CALASSO, *Il negozio giuridico* (Milan 1959) pp. 264ff; J. MALDONADO, "La significación histórica del Derecho canónico," in *Ius Canonicum,* (1969), pp. 32ff; and, with a different critical view on their respective contributions, P. FEDELE, "Considerazioni sull'efficacia dei patti nudi nel diritto canonico," in *Annali Università Macerata,* (1937), pp. 115–200; idem, *Discorso generale sull'ordinamento canonico* (Padova 1941), pp. 63ff; P. BELLINI, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico classico* (Milan 1964).

22. A. ESMEIN, "Le serment...," cit., pp. 269ff; P. FEDELE, "Giuramento," in *Enciclopedia del Diritto,* t. XIX, pp. 169–170.

23. S. MANGIAMELI, "Giuramento (formula del)," in *Novissimo Digesto Italiano, Appendice,* pp. 7–8; cf. also the extensive research done by P. PRODI, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente* (Bologna 1992), pp. 489ff and *passim.*

sealed by means of the invocation of the divine name—without interferences or superimpositions with secular law.

4. *Social consequences of the vow and oath and the intervention of the legislator*

We should remember, however, that the reductive tendency of the spaces of legislative intervention not only affects oaths, but also the discipline of vows.

Such a demarcation of the area of normative intervention, which characterizes the canonical legislation of this century, describes a process opposite to that which began on the threshold of the second millennium, and which has been rightly considered as an "intrusion du droit et de la justice légale."[24] This tendency seems to be more emphasized in the *CIC* as compared to the *CIC*/1917, and can already be noted throughout the revisions in certain aspects: in the intention not to reserve some vows to the Apostolic See, thus rendering the reproduction of the old c. 1309 useless; in that votive obligation is defined as exclusively personal, thus discarding § 2 of c. 1310 *CIC*/1917; in the suspension of the direct annulment of vows and oaths, provided by the *CIC*/1917 in cc. 1312 § 1, 1319,4° and 1320.[25]

The discipline of vows and most of all of oaths dictated by Eastern Churches is even more restricted than that of the Latin Code. The *CCEO* substantially echoes the Latin normative on the matter of vows, with ulterior simplifications regarding the classification of vows, that only distinguishes between public and private ones, ignoring the other Latin classifications that included solemn and simple, personal, real, and mixed; and assigning the administration of the dispensation of vows to the proper hierarchy of each church.

Regarding oaths, the *CCEO* only contains one canon: only an oath made *coram Ecclesia* is admitted, and only in those cases provided by the law: "secus nullum parit effectum canonicum."[26]

Finally, it does not seem superfluous to ask an ulterior question: Why does the law intervene in this matter at all?

The answer seems to be totally peaceful as far as oaths are concerned. Social conscience justly demands their correct usage and condemns their abuse and violation. Positive law itself provides that whoever "in asserting or promising something before an ecclesiastical authority, commits perjury" (c. 1368) can be punished with a just penalty.[27] The same can be said about public vows, by virtue of which, together with the immediate relationship with God characteristic of any vow, a complex

24. P. SÉJOURNÉ, "Voeu," cit., col. 3198.
25. *Comm.* 5 (1973), pp. 45–46.
26. *CCEO*, cc. 889–893, on the vow; on the oath: c. 895.
27. J. ARIAS, *comentario al c. 1368*, in *Pamplona Com.*

juridical relationship is established between the subject and the institute of consecrated life into which the person is accepted.

Regarding private vows, taken *coram Deo*, which take place in the intimacy of conscience, it is understandable that one may wonder where the Church obtains the reason and the right to intervene.[28] It is necessary, however, to say that, regarding this matter, the law does not present a plan of interference in the interior world of the individual, but it concerns itself with the social consequences of these acts of religion.

What can, in my opinion, explain the legal discipline of vows and oaths as a whole is the overriding interest in the tutelage of the individual, in harmony with the objective requirement of ordaining according to justice the interventions that certain subjects and public and private authorities can legitimately perform regarding those acts.

And this interest is expressed, most of all, in regard to the following aspects: *a)* the validity of the act (cc. 1191 § 3 and 1200 § 2); *b)* commutation and cancellation (cc. 1202,1° and 1203); *c)* the special importance that the tutelage of others who have obtained rights as a result of a vow or an oath acquires (cc. 1196 and 1203); *d)* dominative power (cc. 1195 and 1203), which cannot have a bearing *in voluntatem voventis* nor on the will of the one who swears; *e)* and dispensations (cc. 1196, 1202,4° and 1203). This is a subject that has provoked serious disputes throughout the centuries regarding the title ownership of the power and of the dispensation, and, furthermore, regarding the nature of this power, in which it was precisely the cases of *relaxatio* of norms of divine law that was frequently discussed (with regard to marital impediments) or the norms founded on divine law, as in the case of vows and oaths.[29]

Suspension, dispensation, and commutation are the elements in which the social scope of vows and oaths is most visible, and the ecclesiastical authority exercises all its power on these social repercussions, or rather, all its capability of service.

Certainly, in these cases as in others in which this intervention is required, it is most of all dispensations that act as expressions of the pastoral ministry of the Roman Pontiff and of the bishops, both of whom act as vicars of Christ (*LG* 18, 27) to whom these important and delicate instruments have been entrusted, by means of which the Church intervenes *comme la mère de famille*[30] to adapt common resources to the needs of each one.

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28. R. PLUS, "Voeu," cit., p. 1924; W. MOLINSKI, "Voti," in *Enciclopedia teologica Sacramentum Mundi*, VIII (Brescia 1977), cols. 703ff.
29. S. BERLINGÓ, *La causa pastorale della dispensa* (Milan 1978) *passim*.
30. P. SÉJOURNÉ, "Voeu," cit., col. 3231.

CAPUT I
De voto

CHAPTER I
Vows

1191 **§ 1. Votum, idest promissio deliberata ac libera Deo facta de bono possibili et meliore, ex virtute religionis impleri debet.**

§ 2. Nisi iure prohibeantur, omnes congruenti rationis usu pollentes, sunt voti capaces.

§ 3. Votum metu gravi et iniusto vel dolo emissum ipso iure nullum est.

§ 1. A vow is a deliberate and free promise made to God, concerning some good which is possible and better. The virtue of religion requires that it be fulfilled.

§ 2. Unless they are prohibited by law, all who have an appropriate use of reason are capable of making a vow.

§ 3. A vow made as a result of grave and unjust fear or of deceit is by virtue of the law itself invalid.

SOURCES: § 1: c. 1307 § 1
§ 2: c. 1307 § 2
§ 3: c. 1307 § 3

CROSS REFERENCES: cc. 97 § 2, 125, 126, 172 § 1,1°, 188, 643 § 1,4°, 656,1°, 158,1°, 1026, 1103, 1200 § 2, 1538, 1620,3°

COMMENTARY

Silvestro Pettinato

I. DEFINITION OF THE VOW

The first paragraph of this canon presents the traditional definition of vow: "a deliberate and free promise of a possible and better good made to

God." This promise must always be fulfilled because of the virtue of religion.

The vow is, most of all, a promise: it is not a simple desire, an intention, or a piece of advice, but rather, an expression of the will to oblige oneself (*intentio se obligandi*) because of the virtue of religion. What is missing in the mere intention is the will that characterizes the vow, and which has, according to constant doctrine, the binding force of a law, *lex privata*, that whoever takes a vow imposes upon himself. If the *intentio se obligandi* is missing, the vow is void; if, on the other hand, there exists the *animus* to oblige oneself, but not to fulfill the promise, the vow is valid, because its validity does not depend on intending to fulfill the promise but on the will to oblige oneself.[1]

A deliberate promise, guided by conscience, by intellectual knowledge of the duty that derives from it and of the fact that it is an act of *latria* (*ex virtute religionis*), since it is made to God, and the object of which is both a morally and physically better and attainable good. Nevertheless, the authors warn us that the definition of *better good* must be deduced not only *ex rei obiectiva consideratione*, but also by taking into account the place and time, and the personal conditions of whoever intends to make the vow.

The vow does not have to be referred to a supererogatory work, but its objective can instead be works that have already been commanded for some other reason (e.g., a chastity vow that has been imposed *aliunde* may receive a new obligation due to religious causes; it would then acquire a greater merit). It is, however, advised not to do this unless there is sufficient cause for it. Thus, we avoid the multiplication of bonds.[2]

It is precisely in view of the delicate nature of this matter that § 2 of the canon requires that whoever takes the vow have sufficient use of reason.

According to the presumption of c. 97 § 2, a child that has reached the age of seven has the use of reason, and can, accordingly, take a vow. It is, however, necessary that his or her ability to discern must be *congruent*, that is to say, proportional to the matter of the vow. Furthermore, the positive law itself can provide higher age limits, especially in certain cases where the commitments of the vow are particularly burdensome, such as eighteen years for the temporary profession (c. 656,1°), and twenty-one for perpetual profession (c. 658,1°).

For the vow to be valid, it is necessary that the deliberation be exhaustive and the freedom with which it is performed be absolute. To ensure the completeness of the deliberation, c. 126 sanctions the nullity of any act performed ignorantly or by mistake rather than debating about

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1. A.M. DE LIGOURI, *Theologia Moralis*, ed. L. GAUDÉ, I (Graz 1954), pp. 499–500.
2. M. CONTE A CORONATA, *Institutiones Iuris Canonici*, II (Turin 1931), pp. 214ff.

what constitutes the substance of the act (substantial error is that which is the cause of the vow: substantial ignorance—according to the aforementioned definition—the essential properties, or the matter, or the cause of the vow), or that falls upon a condition *sine qua non.*

II. FEAR AS THE CAUSE OF NULLITY FOR A VOW

1. *Physical violence and moral violence*

Besides being deliberate, the promise must be made freely. Indeed, the moral act, and, in its own genre, the juridical act, essentially postulate the free expression of its author's will.

Suárez presents as common doctrine that for the vow to be valid, as much freedom as is sufficient *ad peccandum mortaliter* is required. The vow is a form of contract (*veluti quidam contractus*) or pact between the human being and God, in virtue of which the individual imposes upon himself a very grave obligation, the transgression of which results in a mortal sin; as far a moral obligation is concerned, the vow must be a result "ex proprio actu morali, et consequenter sufficienter libero."[3]

The opposite of freedom, or, as many writers prefer to call it, the opposite of perfect freedom, is not only someone else's injurious behavior, but also violence, which can be of two different types: physical (*vis corpori illata*) or moral (*vis animo illata*). This second type takes into account not only someone else's violent action but the fear that it provokes (*vis ac metus*).

Section 3 of the present canon does not refer to the first kind of violence, because this one is dealt with in a general way in c. 125 § 1, which establishes the nullity of the act performed due to absolute or physical violence that the individual is "unable to resist." If in any way, as positive law and natural law provide, the act performed due to physical violence must be considered non-existent (*pro infecto habetur*), the interpretation of an act performed due to moral violence presents non-univocal solutions of positive law.[4] The latter provides, in general terms, that such an act be valid (even though it can be rescinded by the judge's sentence) (c. 125 § 2), and provides for certain acts nullity *ipso iure* (cc. 172 § 1,1°; 188; 643 § 1,4°; 656 and 658; 1026; 1103; 1191 § 3; 1200 § 2; 1538; 1620,3°).

3. F. SUÁREZ, *De religione*, Tract. VI, *De voto*, L. I, ch. VI, in *Opera omnia*, ed. C. BERTON, vol. XIV (Paris 1859), p. 774.

4. J. FORNÉS, "El acto jurídico canónico (sugerencias para una teoría general)," in *Ius Canonicum* 49 (1985), p. 68; F. ZANCHINI DI CASTIGLIONCHIO. "Voto (dir. can.)," in *Enciclopedia del diritto*, t. XLVI, p. 1104 and, in general, O. GIACCHI, *La violenza nel negozio giuridico canonico* (Milan 1937) *passim.*

2. *Structural requirements for the notion of moral violence*

According to § 3 of the present canon, violence can only cause the nullity of the vow when the fear that it provokes is grave and unjust. Indeed, the norm emphasizes the importance of this fear, but one cannot conceive an "unjust" fear that is not determined from the outside by an antijuridic (unjust) behavior of an individual other than the *metuens*. Hence, the requirements indicated in the canon are: grave fear provoked from without in an unjust manner.

The causes that can provoke the *mentis trepidatio* are many, and the doctrine differentiates among them—distinguishing *certa ab incertis*[5]—according to whether they provoke the invalidity of the act, or, on the other hand, are not relevant to that effect.

Fear of an imminent or future evil can come from either of the following sources:from within, that is to say, from a cause inherent to the subject that takes the vow; or from external causes that, in turn, can include: natural causes (extrinsic, necessary causes), such as a serious epidemic, a natural catastrophe, risk of shipwreck, and other such situations; external causes, in other words, the violent action of a man that may be intended to force the vow (*metus directus*) or may not aim to do so but inadvertently does, as would be the case if some thieves attacked someone to steal from him or for some other purpose (*metus indirectus*).

a) *First requirement:* gravitas

The doctrine explores whether slight and unjust fear, when it is the cause of the vow, must be considered relevant for the purposes of nullity, but the norm expressly requires that it be grave fear that we deal with: slight fear may be relevant, on the other hand, in the internal forum, and the dispensation of a vow taken in such conditions may be asked for.

In order for fear to be able to determine the nullity of the vow, it is necessary for it to be grave, or, in other words, sufficient to influence an individual who can be considered neither fainthearted, on the one hand, nor gifted with an extraordinary strength of spirit on the other.

We are not considering here the *vir constantissimus* that has come to us from Justinian sources (D. 4.2.6: "Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus"), but, the *vir constans* of the sources of classical canon law (*X* IV, 1, 15; I, 40, 6: "Metum passo non subvenitur, si non fuit talis, qui cadere potuit in constantem virum").

We should also emphasize that the expression *vir constans* is not used in canon law following the Roman law conception of the middle man, objectively and abstractly considered, but in an eminently subjective

5. F. SUÁREZ, *De religione*, cit., p. 776.

sense. This subjectivist notion, which was mainly developed in the ambit of marriage consent,[6] and that we find in most important, modern systems,[7] has been confirmed by the development of this matter throughout the history of canonical literature (which shows its prevalence over other notions of an objective nature), and allows us to take not a person as a reference point—a type ideally conceived, in accordance with whom the gravity of the fear should be measured—but that specific person who suffers it, taking into account that person's situation, age, sex, health, etc.

b) *Extrinsic character and* iniuria

Fear that comes from inside is irrelevant because "*a Deo offertur*;"[8] and this is also the case of the fear that is provoked by natural causes. The fear, on the other hand, must be due to an external, free cause; in other words, it must be the work of a person. But this in itself is not enough: it is also necessary that the evil with which the human action threatens be unjust.

But how can one think, even hypothetically, of a moral violence that is just, in other words, in accordance with the law? According to the tradition of canonical doctrine and jurisprudence, there is no *iniuria* when there is a coincidence between the objective of the law and that aimed for by the *metum incutiens*,[9] thus, if the threat to assert one's right by legal means is uttered, which, in itself, is a correct use of one's own right (*metus ex lege*) to obtain something that is due, then there is no *iniuria*. Neither is there inuria if someone is threatened by being legitimately warned of a penal sanction by the competent judge (*metus ex iudice*).

As far as the vow is concerned—unlike the old law[10]— there is no norm whatsoever foreseeing the fact that the judge may force an individual *ad vovendum* (the *metus ex iudice* hypothesis does not subsist). And a *metus ex lege* is not possible, at least as far as public vows are concerned, since it entails a change of state of life. Any norm that may have the act of coercion as the cause of entrance into an institute of consecrated life would find an insurmountable obstacle in c. 219, which recognizes the right of all the faithful to have immunity of coercion in the choice of their own state of life.[11] As far as private vows are concerned, it

6. O. GIACCHI, *Il consenso nel matrimonio canonico* (Milan 1968), p. 206; O. FUMAGALLI CARULLI, *Intelletto e volontà nel consenso matrimoniale in diritto canonico* (Milan 1974), pp. 385ff; in a critical sense, G. DOSSETTI, *La violenza nel matrimonio in diritto canonico* (Milan 1943), pp. 466ff

7. Cf., art. 1112 of the *Code Napoleon*, and POTHIER, *Trattato delle obbligazioni*, I (Naples 1819), pp. 36–37.

8. D. SOTO, *De iustitia et iure*, L. VII, *De voto*, q. 2, in V.D. CARRO-M. GONZÁLEZ ORDÓÑEZ (Eds.), *Ed. facsim. de la hecha por D. Soto en 1556, con su versión castellana correspondiente* (Madrid 1968), p. 632.

9. G. MICHIELS, *Principles generalia de personis in Ecclesia* (Tournai 1955), pp. 622–623; O. FUMAGALLI-CARULLI, *Intelletto e volontà*..., cit., p. 396.

10. G. DOSSETTI, *La violenza*..., cit., p. 263.

should be noted that the foundation and cause of the vow is not the law, neither is the precept of a superior, but only the deliberation and will of the individual.

Hence, the conclusion that can be deduced from these notes is that, as far as vows are concerned, the canonical system does not provide for a situation in which fear can be justly inflicted.[12]

On the other hand, the adjective *unjust* is not employed *inutiliter* in the context of the canon upon which we are commenting. In the discipline of the vow, this adjective does not intend to distinguish between phenomena of just fear and unjust fear, which would be possible, however, in the general assumption of c. 125 § 2. It intends, however, to indicate the difference between several assumptions of *metus*: some are not relevant to positive law, because human action is missing (these are the hypothesis of intrinsic or extrinsic fear due to a necessary cause); others are punishable because the *mentis trepidatio* is caused by a fear inflicted by a violent action performed by another individual: it is sufficient for this action to be violent (and grave) to the point of producing a grave fear in order for the law to consider it absolutely unjust.

c) *The problem of* consulto illatio

Finally, we should wonder whether this anti-juridical activity deliberately intends to force the vow (*consulto illata*) so as to produce its nullity.

The doctrine prior to the *CIC*/1917 was organized mainly according to the following line of progression: fear does not allow the vow to bind because the *voluntarium* is missing. But fear comes in a number of varieties, and, accordingly, we should differentiate between external and internal fear: the first one can be said to prevent, the second one does not.

But, not all types of external fear prevent the vow from binding. Its mere extrinsic nature is not sufficient because fear can originate in an external cause such as a shipwreck: in this case the vow binds. And the fact that it may be caused by a person is not sufficient either: it is required that it be caused with *iniuria*.

Even these criteria are not sufficient; it is necessary that the fear be unjustly caused by an individual with the intention of forcing someone to take the vow.[13]

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11. J. HERVADA, *Elementos de Derecho Constitucional Canónico* (Pamplona 1987), pp. 133ff (trad. ital. of G. LO CASTRO: *Diritto costituzionale canonico* (Milan 1989), pp. 124ff).

12. MASSEO DA CASOLA, *Compendio di diritto canonico* (Turin 1967), p. 812; H.J.F. REINHARDT, "Gelübde und Eid," in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1990), sub. c. 1191/2. On this point, cf. the considerations of S. BERLINGÒ, "Violenza (dir. can.)," in *Enciclopedia del diritto*, t. XLVI, p. 917.

13. D. SOTO, *De iustitia et iure*, cit., p. 632.

In essence the progression developed by Soto reveals the nature of the finality of the *consulto illatio*. Its goal is to perform a further distinction, this time in the ambit of assumptions of fear originating in an anti-juridical human action, that grants relevance to the effects of nullity only to that fear that is inflicted with the intention of forcing the vow to be taken, with the logical consequence of restraining the space of tutelage of the *metuens*'s freedom.

The rigorous conclusion of the doctrine is not, on the other hand, unfounded. Indeed, it is argued that in the fear that originates internally and in that which is provoked by natural causes, there is no *iniuria*; furthermore, the acts of kindness performed in fear please God, who "per tribulationes et pericula inducit homines ad vota emittenda."[14] On the other hand, grave and unjust fear that is not inflicted *ad extorquendum*, as far as vows are concerned, is not distinguished from natural fear. Only the *consulto illatio*, the anti-juridical behavior of the *metum incutiens*, on the one hand, and the tainted will of the *metum patiens*, on the other hand, lead to the nullity of the vow.

This argument, so consistently logical, begins to falter, however, in view of the phrasing of c. 1307 § 3 of the *CIC*/1917, reproduced literally (with the only exception of the inclusion of the fraud) in the current c. 1191 § 3: "*votum emissum*" and not "*votum extortum.*"

As a matter of fact, in accordance with a long tradition of parallel exegesis between the discipline of the vow and that of marriage, the prevalent doctrine before the *CIC*/1917 considered that the solution adopted in c. 1307 § 3, like the one contained in c. 1087 of the previous Code, provided a solution *benigniore modo* to the controversy concerning the vow taken in a situation of fear caused by someone else's unjust action, even *haud consulto incussum.*

With the exception of certain restrictive positions that require fear to be inflicted *ad extorquendum votum*,[15] this doctrine generally considers that the vow is null when the fear has been provoked *ad extorquendum* (*causa motiva*: "occidam te nisi voveris"; "exheredabo nisi voveas virginitatem"), but also when it is *causa mere impulsiva* of the vow (such as in the example presented in the manuals where two rival individuals are fighting for the same woman, and one of the two, who is at risk of being killed by the other one, to save his life expresses in front of his adversary his desire to take the vow of entering a religious order). On the other hand, when the fear is only a mere circumstance (*mera occasio*) of the vow—such as when, in the case of an aggression by thieves, someone takes a vow begging to be spared in return—this would not entail nullity,

14. F. SUÁREZ, *De religione*, cit., p. 776.

15. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. IV (Rome 1934), p. 655; A.C JEMOLO, "Voto (diritto ecclesiastico)," in *Nuovo Digesto Italiano*, vol. XII, pr. II, p. 1147.

because in this case it would be similar to the risk of shipwreck or that resulting from some other necessary cause.[16]

But, to lead matters back toward the restoration of the *perfecta libertas* of the person who takes the vow, it is necessary to overcome this final limitation, including, *etiam probabiliter*, the hypothesis of nullity even for the fear that is a mere circumstance of the vow.[17]

According to the dictate of c. 1191 § 3, vows must be considered null when the fear is grave, comes from without, and is provoked by someone else's violent (and thereby anti-juridical) behavior. To be part of this assumption, it is not necessary to distinguish the motivating reason from the instrumental cause and from mere circumstance.

16. M. CONTE A CORONATA, *Institutiones Iuris Canonici*, cit., p. 215; S. SIPOS, *Enchiridion iuris canonici* (Pécs 1936), p. 718; G. COCCHI, *Commentarium in Codicem Iuris Canonici* (Turin 1942), p. 260; A. VERMEERSCH-I. CREUSEN, *Epitome Iuris Canonici*, t. II (Brussels 1954), pp. 446–447.
17. T. JORIO, *Theologia Moralis*, II (Naples 1964), pp. 58–59.

1192 **§ 1. Votum est publicum, si nomine Ecclesiae a legitimo Superiore acceptetur; secus privatim.**

§ 2. Sollemne, si ab Ecclesia uti tale fuerit agnitum; secus simplex.

§ 3. Personale, quo actio voventis promittitur; reale, quo promittitur res aliqua; mixtum, quod personalis et realis naturam participat.

§ 1. A vow is public if it is received in the name of the Church by a lawful Superior; otherwise, it is private.

§ 2. It is solemn if it is recognised by the Church as such; otherwise, it is simple.

§ 3. It is personal if it promises an action by the person making the vow; real, if it promises some thing; mixed, if it has both a personal and a real aspect.

SOURCES: § 1: c. 1308 § 1; *PME* 119; *SC* 80; *LG* 44, 45; *Ordo professionis religiosae*, 2 feb. 1970, 2
§ 2: c. 1308 § 2; SCR Rescr., 8 iul. 1974
§ 3: c. 1308 § 4

CROSS REFERENCES: cc. 573 § 2, 598–601, 603 § 2, 654, 668 §§ 1–5, 686–688, 692, 1078 § 2,1°, 1088

COMMENTARY

Silvestro Pettinato

The first paragraph, which is identical to c. 1308 § 1 *CIC*/1917, reproduces the traditional distinction between public and private vow.

A vow is *public* if it is received in the name of the Church and accepted as such by the legitimate ecclesiastic Superior. It is *private* in all other cases, in other words, when the two requirements that connote its publicity are missing (being received in the name of the Church, by the legitimate Superior; that is to say, the one that is competent according to law). Private vows are not issued *coram Ecclesia*, but only *coram Deo*, although they may be manifested in the presence of many other individuals.

During the revision of the *CIC*/1917, some organs of consultation observed that the distinction between public and private no longer responded to today's reality, in as much as the Church also recognized the vows of the societies of common life and of secular institutes that, even

though they are not public in the traditional sense, cannot be considered as private either. Consequently, this seemed to be the right time to adopt a tripartite division, to encompass all the different kinds of vows (public, semipublic, and private). But the question was not considered developed enough to justify the use of a new terminology. Another reason was that there were different opinions regarding at least the nature of secular institutes: public for some, in as much as they have a certain official nature within the Church; private for others, because they are not accepted *nomine Ecclesiae.*[1]

The distinction presented in § 2 between a *solemn* vow (recognized as such by the Church) and a *simple* one, can only be found in this part of the Code. Since this distinction had been suppressed ("iuxta criterium simplificationis") in the canons dealing with the institutes of consecrated life, it was asked that it not be reproduced in this book either. It has been preserved, however, both because it can be provided for by the law proper to the members of religious orders, and because, according to what has been argued, it contains a theological foundation.[2]

It is provided in a decretal of Boniface VIII that the solemnity of a vow derives "ex sola constitutione Ecclesiae."[3] During many centuries, however, the teaching has been divided on this point. The authors considered that the essential element of solemnity was inherent in the special consecration or blessing that accompanied the taking of the vow, the perpetual and irrevocable dedication of the subject, or in the incapacitating force recognized in the vow, and in the tutelage that the law provided as to the juridical consequences derived from it.[4]

On the other hand, the difference between solemn and simple vows could be expressed by referring to the consequences that the abrogated Code derived from each one of them: c. 579 *CIC*/1917 considered the acts against the simple, temporal, or perpetual profession to be illicit; and it considered invalid those acts against solemn profession (see other dispositions of the *CIC*/1917 regarding the marital and patrimonial matter, cc. 1703 and 1119; 569 § 1; 580 § 1; 581–582).

If we continue to approach this question from the perspective of juridical consequences, we should take into account that in the *CIC* there is no distinction between solemn and simple vows; a distinction is made, however, between public and private vows.

The vows of chastity, poverty, and obedience issued in religious institutes are public in as much as they are accepted by the legitimate superior in the name of the Church (cc. 573 § 2; 598–601; 603 § 2; public vow of a hermit, c. 654).

1. *Comm.* 12 (1980), p. 375.
2. *Comm.* 12 (1980), p. 376; 15 (1983), p. 73.
3. *VI* III, 15, c. 1.
4. A. VERMEERSCH, *De religiosis*, II (Heverlee-Louvain 1962), pp. 11ff.

In the matter of the *ius connubii*, the bond that derives from the public vow of chastity operates as an invalidating impediment (c. 1088), and the vow of poverty renders those who profess it incapable of acquiring or possessing goods, and, consequently, brings about the invalidity of those acts contrary to the vow (c. 668 §§ 1–2).

As far as the power of dispensation of public vows, besides cc. 686–688, which regulate the process of leaving an institute, c. 691 § 2 provides that the corresponding indult—which entails *ipso iure* the dispensation of the vows (c. 692)—is reserved to the Apostolic See for the institutes of pontifical right, whereas for the institutes of diocesan right, it can be granted by the ordinary of the diocese in which the house that the applicant belongs to is located. The Apostolic See reserves to itself the dispensation of the marital impediment derived from the perpetual, public vow of chastity issued in a religious institute of pontifical right (c. 1078 § 2,1°).

The third paragraph of this canon reproduces the old threefold division of private vows: personal, real, or mixed.

For a vow to be *personal*, its object must be an action that must be performed in person by the individual: the recitation of a prayer, a pilgrimage, etc. A *real* vow is that which promises to give something, a good belonging to the individual (an offering, a donation to an entity, to a private association, or to individuals) and, can be performed by someone other than the *vovens*, with the obvious liberating effect on the latter. A vow is *mixed* when its goal shares both the characteristics of the real and personal ones, for instance, a pilgrimage followed by an offering of something.

Moral theologians tend to make other distinctions: a determined vow if the thing that is promised is clearly indicated; a disjunctive or alternative vow if the individual decides to fulfill a promise chosen from a series of promises in accordance to his or her own judgment; and a temporal or perpetual vow, which depends on the duration of the promise (express or tacit; absolute or conditioned, etc.).

1193 **Votum non obligat, ratione sui, nisi emittentem.**

Of its nature a vow obliges only the person who makes it.

SOURCES: c. 1310; *SCCong* Resp., 18 ian. 1936 (*AAS* 29 [1937] 343–345)

CROSS REFERENCES: —

COMMENTARY

Silvestro Pettinato

This canon defines the exclusively personal nature of the votive obligation. *Ratione sui*; in other words, in as much as it is a deliberate promise made to God, the vow binds *ex virtute religionis* only that individual who makes it.

The preceding disposition, accordingly, is no longer relevant (c. 1310 § 2 *CIC*/1917). This disposition provided that the obligation of the real vow, or, of the real part of the mixed vow, was to be transmitted to the inheritor. This change also puts an end to the controversial question of the reason and the title of this inherited disposition; according to the different theories, the obligation is transmitted to the inheritor not by virtue of the vow, but: to do justice to the originator; by virtue of the acceptance of the inheritance (*ratione contractus*); in view of the promise of the testator; or due to the virtue of religion itself.

The present canon puts an end to this question. On the one hand, during the revision, the tendency not to reproduce the norm of the old c. 1310 § 2 appeared very soon because, taking into account the current context of secularization, it was considered inappropriate, even incongruent, for the obligation that the originator had incurred *coram Deo* in the forum of conscience to be transmitted to the inheritor—perhaps with the express specification, as some requested, that this could be provided for not by virtue of the vow, but in accordance with the promise of the testator.[1]

Another aspect of the question related to the personal nature of the vow. This issue concerned the doctrine in the past in relation to the votive promises made by a community: whether these promises commit only the people that have taken the vow, or if they also commit all the other individuals who have participated, even those who are to enter the community over time.

1. *Comm.* 5 (1973), p. 45; 11 (1977), p. 268; 12 (1980), p. 376.

Frankly, the doctrine was rather consistent when it considered that a conditional obligation with the same object as the vow could be imposed on those who had not participated in it only by means of a law or statute, and, consequently, by virtue of the obedience due to these norms and not by virtue of religion. This doctrinal orientation was also confirmed by a *resolutio* of the S. Congregation of the Council in which it is said precisely that "vi voti non obligantur nisi qui voventur."[2]

To heed the "personability" of votive obligations means, all in all, to return to the essential elements of our argument, the vow as a very personal act, by means of which a person contracts *coram Deo*, a normally grave obligation in conscience.

The promise made by one individual to another, even when faced with an eventual silence of positive law, binds: *ex fidelitate*, because a moral obligation is imposed on the promittent in accordance with the words and deeds; *ex iustitia*, when the promise is known and accepted by the recipient of the vow, for whom a *ius ad rem* arises (unless the promittent did not intend to transfer a right to the other one), and also when we are dealing with reciprocal promises or promises confirmed by an oath.[3]

The simple promise that binds *ex fidelitate* generates an intrasubjective obligation, in the sense that the promittent responds only in the forum of conscience. When the promise binds *ex iustitia*, it becomes binding also by means of another title: an intersubjective relationship is established because a "ius ad rem promissam" originates in the recipient of the vow, even in the case of silence of the human legislator, since we are dealing with an obligation of natural law.

In the vow, on the other hand, we certainly reach a higher dimension of justice, not only because the virtue of religion plays an important role here, a role that is superior to all other moral virtues, but, also because in this highly peculiar relationship, we no longer find two individuals, but a human being and God.

The vow taken *ex virtute religionis* by a free and conscious subject on a licit and possible matter, is truly manifested with a perfect, compulsory structure that does not require subsequent determinations.

This personal relation between the individual and God—the individual who makes the promise, giving his own fidelity, and God who accepts this promise and desires its fulfillment, Himself being, at the same time, the "Faithful God" (CCC, 2101)—in as much as it is sanctioned by divine positive law, represents a higher dimension of justice: "God, master of all things by right of creation, acquires, by virtue of our promise and without

2. S. Congr. CONCILII, "Bogoten," (January 18,1936), in X. OCHOA, *LE Ecclesiae post Codicem iuris canonici editas*, I (Rome 1966), pp. 1708–1710.
3. A. LEHMKUHL, *Theologia moralis*, I (Freiburg im Breisgau 1896), pp. 288, 678; E. GENICOT, *Institutiones theologiae moralis*, I (Brussels 1927), p. 523.

needing further formalities, a new right *ad rem promissam*, and turns it into the object of his positive demands."[4]

On the other hand, all other subjects are initially excluded from the sphere of this relation, unless, as a consequence of the real vow or of the real part of the mixed vow, demands of justice in favor of third parties can be configured. We should not forget that the obligation of religion, as such, does not originate rights in third parties; this can only be the result of the obligation of justice.

This last circumstance is precisely verified when, in the real vow, the votive promise (of religion) is accompanied by a concomitant promise (of justice) made to another person, physically or juridically, of transferring the good that constitutes the object of the vow or of its execution, consistent with the transference of the object promised to the patrimony of the other.[5]

Consequently, the subject, who is committed only to God by virtue of the vow and moved by the conscious need to fulfill it, also assumes the consequent obligation to fulfill the promise made to the third beneficiary, who acquires an *ius ad rem*. If this promise is fulfilled, the thing that was promised can no longer be claimed by the person who makes the vow due to the *soluti retentio* that the third pary—having in this case a *ius in re*—will be able to oppose to any eventual pretension.

4. P. SÉJOURNÉ, "Voeu," in *Dictionnaire de Théologie Catholique*, t. XV, p. II, col. 3219.
5. A. VERMEERSCH, *Theologiae moralis principia, responsa, consilia*, II (Rome 1945), p. 149.

1194 **Cessat votum lapsu temporis ad finiendam obligationem appositi, mutatione substantiali materiae promissae, deficiente condicione a qua votum pendet aut eiusdem causa finali, dispensatione, commutatione.**

A vow ceases by lapse of the time specified for the fulfilment of the obligation, or by a substantial change in the matter promised, or by cessation of a condition upon which the vow depended or of the purpose of the vow, or by dispensation, or by commutation.

SOURCES: c. 1311

CROSS REFERENCES: c. 1202

COMMENTARY

Silvestro Pettinato

The cessation of the vow can be determined by dispensation, commutation, and by other causes indicated in this canon.

1. *When the specified time has elapsed for the fulfillment of the obligation*

If, upon issuing the vow, no deadline is provided, it is considered that the fulfillment must take place in a period of time that must to be determined according to the judgment of a *vir prudens*.

The deadline can be established (obviously by the same person who takes the vow) *ad urgendam obligationem* or *ad finiendam obligationem*. It is normally assumed that the deadline for the personal vow is *ad finiendam*, and for the real vow *ad urgendam*.

If it is set *ad urgendam*, and the vow is not fulfilled in that period of time, it will have to be subsequently fulfilled in any case, whatever its nature may be, real or personal. On the other hand, when it has been set *ad finiendam*, the obligation ceases once the deadline is met.

2. *When the promised matter has changed substantially*

This assumption includes those cases in which the thing promised becomes illicit, impossible (physically or morally), useless, or an obstacle for a higher good; and in those cases where the fulfillment of the vow becomes considerably more onerous and difficult than was originally expected.

3. *When the condition upon which the vow depended is not verified*

In this case, we are dealing with a conditional vow; its obligation is attached to the verification of an uncertain, future, possible, and licit event.

If the condition is not verified, the vow ceases; but, as long it is unfulfilled, the subject must refrain from performing other acts that may provoke a deterioration or loss of the promised thing (in the real vow), and cannot licitly invoke a *ius poenitendi* to change his or her will.

4. *When the final cause of the vow is lacking*

Final cause is the *intentio seu ratio primaria* that motivates the subject to take the vow; in other words, the one that is the subject's main objective and that has been the efficient cause of the vow. Thus, for instance, in a promise consisting of a periodic subsidy to a person in need, if the person were no longer financially constrained, the very cause for the vow would disappear.

1195 Qui potestatem in voti materiam habet, potest voti obligationem tamdiu suspendere, quamdiu voti adimpletio sibi praeiudicium afferat.

A person who has power over the matter of a vow can suspend the obligation of the vow for such time as the fulfillment of the vow would affect that person adversely.

SOURCES: c. 1312

CROSS REFERENCES: c. 1203

COMMENTARY

Silvestro Pettinato

Section 1 of c. 1312 of the *CIC*/1917 provided that the subjects given dominative power *in voluntatem voventis* could validly rescind (annul) the vows made by the individuals bound to them, and, given a fair cause, could do so licitly, so that the corresponding obligation would not be able to be revived.

During the revision of the Code, it was noticed that preserving this paragraph would cause many problems. As a matter of fact, the consultors believed it was not fair to grant the title owners of dominative power such a broad power of disposal over the will that it could even rescind the vow.[1]

Canon 1195, accordingly, does not comment on the so-called "direct annulment of a vow," and only preserves the possibility of rescinding the obligation of the vow. Whoever has power in matters concerning a specific vow (and accordingly, not over all the vows) can suspend the obligation, alleging that its fulfillment causes serious damage.

The rationale is evident: no one can promise something over which he or she does not have full command, and the vow cannot cause damage to the relationships in which the subject is immersed.

The authorities invested with power of jurisdiction (the Roman Pontiff, and, in accordance with the different ambits of competence, the bishops and superiors of institutes of consecrated life that enjoy this power) can suspend the vows. In addition, by virtue of the dominative *seu domestica* power, all those that in one way or another have the office of governing a particular community, from the family to the religious institute, can

1. *Comm.* 5 (1973), pp. 45–46; 12 (1980), p. 377.

suspend the vows, if the subject of the vow is such that it may become an obstacle or damage the orderly governance of that community.

Finally, the suspension takes place *invito vovente* (unlike the dispensation that never occurs *in invitos*), and it does not rescind the vow, but simply waves its compulsory nature, which normally revives when the cause of the suspension ceases.

1196 **Praeter Romanum Pontificem, vota privata possunt iusta de causa dispensare, dummodo dispensatio ne laedat ius aliis quaesitum:**

1° loci Ordinarius et parochus, quod attinet ad omnes ipsorum subditos atque etiam peregrinos;

2° Superior instituti religiosi aut societatis vitae apostolicae, si sint clericalia iuris pontificii, quod attinet ad sodales, novitios atque personas, quae diu noctuque in domo instituti aut societatis degunt;

3° ii quibus ab Apostolica Sede vel ab Ordinario loci delegata fuerit dispensandi potestas.

Besides the Roman Pontiff, the following can for a just reason dispense from private vows, provided the dispensation does not injure the acquired rights of others:

1° the local Ordinary and the parish priest, in respect of all their own subjects and also of *peregrini;*

2° the Superior of a religious institute or of a society of apostolic life, if these are clerical and of pontifical right, in respect of members, novices and those who reside day and night in a house of the institute or society;

3° those to whom the faculty of dispensing has been delegated by the Apostolic See or by the local Ordinary.

SOURCES: 1°: c. 1313, 1°
2°: c. 1313, 2°
3°: c. 1313, 3°

CROSS REFERENCES: cc. 19, 85, 686–688, 691–693, 701, 1078, 1079, 1203

COMMENTARY

Silvestro Pettinato

1. *Dispensation from vows*

The dispensation that this canon deals with only concerns private vows (for public vows, cf. cc. 686–688; 691–693; 1078–1079).

Regarding the subjects to which the power of dispensation is granted or recognized, the canon contains some innovations when compared with c. 1313 *CIC*/1917: no. 1° grants the parish priest the faculty of dispensing

the vows of subjects and foreigners; no. 2° grants the superiors of religious institutes and of the societies of apostolic life, if they are clerical and of pontifical right (since in that case they would have power of jurisdiction, the only one that authorizes them for the *potestas dispensandi*), regarding the vows of the individuals indicated in this number;[1] finally, no. 3° grants the local ordinary the faculty of delegating, which the corresponding no. 3° of c. 1313 *CIC*/1917 reserved to the Apostolic See.

There is not a general consensus regarding the nature of this dispensation. Some authors argue that in this case we are dealing with a real and proper dispensation, and others argue that we are dealing with a dispensation in an improper sense.

The systematic nature of the canon seems to aim in this last direction, taking into account the disposition of c. 85, which defines dispensation as the relaxation (*relaxatio*) of a merely ecclesiastical law in a particular case, and those of cc. 1196 and 1203 regarding the dispensation of vow and oath, two acts that do not base their *raison d'etre* and their compulsory nature on a "merely ecclesiastical" law.

It does not seem, on the other hand, that either are favored by the doctrine or the "obsolete argument"[2] according to which the Church would not have the power to dispense in matters related to divine law, but only a *potestas interpretandi*; nor those that argue that we should consider that an implicit condition "nisi superior obligationem sustulerit" is included in any vow.

As far as the first argument is concerned, we note that, while the dispensation entails the existence of a bond of obligation in the act and eliminates it, the declaration or interpretation, on the other hand, does not eliminate the existing obligation, but rather expresses that that obligation, at least in the particular act, does not exist.

As far as the thesis of the implicit condition, accepting it would entail a fiction not required by the law that, among other things, could lead us to the erroneous belief that a dispensation can be accepted without a just cause, and, furthermore, that the vow can be rescinded.[3]

The doctrine, on the other hand, generally agrees in considering that one can give a dispensation for vows and oaths, although different dogmatic conclusions are extracted from it. Indeed, if the dispensation eliminates the vow or the oath, the *relaxatio* has a bearing on divine law; if the "matter" is removed, the act of remission does not conflict with the indispensability of the divine norm.

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1. That power had already been conceded in virtue of the Rescr. *Cum admotae* (*CAd*), of the Secretary of State.
2. S. BERLINGÒ, *La causa pastorale della dispensa* (Milan 1978), p. 329.
3. A. LEHMKUHL, *Theologia moralis*, I (Freiburg im Breisgau 1896), pp. 284–286; F.X. WERNZ, *Ius Decretalium*, t. III, p. II (Rome 1908), pp. 240–241.

On the first issue, there is the well-known thesis of Sánchez, according to which there are divine precepts "quae nulla salutis detrimenta afferre possunt," for which no dispensation can be granted; and others, such as the vow and the oath, "numquam maius bonum impedire solent et in spiritualis salutis detrimentum vergere." The Church has conceded in these cases a "potestas vere dispensandi" whenever it is necessary to preserve a higher good.[4]

The second solution has been presented by Suárez, who argues that the precepts of natural law, the obligation of which depends "a priori consensu voluntatis humanae"— as is the case with the vow and oath—can be dispensed by the human authority, not in the proper sense (*praecise*) of eliminating the obligation of the natural law, but "mediante aliqua remissione, quae fit ex parte materiae." That remission is improperly called a dispensation of natural law, but it should be called, strictly speaking, "dispensatio facti quam iuris," because it does not derive from a *relaxatio*, but "remittitur debitum ortum ex consensu humano."[5]

Suárez's thesis, which is the one the doctrine tends to agree with, appeals to one of the main features of the structure of the vow and the oath as acts that are the result of the individual's free choice and determination, whose predominantly elective nature appears in the Old Testament source (Deut 23: 22–24) and is presented in the synthesis of Gratian (see introduction to title V). Hostiense, among others, bases his teachings on the following synthesis: a dispensation cannot be granted in the necessary vows (*vota necessitatis*), such as those taken through baptism ("tenere fidem, servare Decalogum et alia, sine quibus salus non est"), but it can be granted for voluntary vows (*vota voluntatis*), "sicut et in omnibus illis, quae ante emissionem voti possunt fieri, vel non fieri sine peccato."[6]

All things considered, whether the thesis of the *remissio*, *condonatio*, *relaxatio*, only of the obligation and not of the vow, or, as it is also said, only of the matter, or the thesis of the total *ablatio* of the vow is adopted (the freeing effect on the subject is the same, and the same happens in the case of the thesis of the dispensation as *interpretatio*),[7] since the power to produce such consequences is vicarious, in other words, it is exercised *nomine Dei*, all authorities that are invested with it are, in this sense, "inferior." Since they do not dispense from the law, the existence of

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4. TH. SÁNCHEZ, *Disputationes de sancto matrimonii sacramento*, t. II (Venice 1612), L. VIII, disp. VI, nos. 2 and 5.

5. F. SUÁREZ, *De legibus*, L. II. ch. XIV, nos. 11, 20ff, in *Opera omnia*, ed. C. BERTON, vol. V (Paris 1859), pp. 138–142; *De religione*, Tract. VI, *De voto*, L. VI, ch. IX, ibid., p. 1087.

6. HOSTIENSE, *In sex libros decretalium commentaria, comm. ad X* 3, 3. *De voto et voti redemptione* (Venice 1581) (ed. anast. Turin 1965), c. *De peregrinatione votis*, fol. 124 A; idem, *Summa aurea*, III, *De voto et voti redemptione* (Venice 1574), col. 1126, no. 2.

7. S. BERLINGÒ, "Dispensa (dir. can.)," in *Enciclopedia giuridica*, XI, p. 1; idem, *Giustizia e carità nell'economia della Chiesa* (Turin 1991), pp. 182–183.

a just cause is a necessary requirement for the dispensation to be validly granted.

The different reasons that can be argued as a just cause for the dispensation have been synthesized again by Alphonsus Maria de Ligouri's authoritative doctrine, and are deferrable to: the "bonum Ecclesiae, vel commune reipublicae"; the considerable difficulty of the fulfillment of the vow; and the imperfection of the act, or, the "levitas ac facilitas, ex qua processit votum." They can refer specifically to the danger of transgression, the difficulty, even when unforeseen, of the execution, the lack of deliberation and total freedom, a non-grave fear inflicted from the outside, and to *metus ab intrinseco.*[8]

2. *Rights of third parties*

No right whatsoever for other subjects results from the virtue of religion regarding the matter of a vow (see commentary on c. 1193). The opposite can happen only in the case of the real vow as a consequence of a promise made to a physical or juridical person, or when the vow follows the execution of a promise entailing transference of something to someone else's estate.

Both in the case of a promise known and accepted by the beneficiary, and when the thing has been transferred to his estate, there is no doubt that, in accordance with the most common doctrine, a right (*ad rem* in the first case; *in re* in the second case) originates in this person, which, by virtue of justice, is represented as deserving to be safeguarded.

In the first case, when the third party has only an *ius ad rem*, we face the problem of how to safeguard the reasons that derive from the natural obligation that the *vovens* has accepted.

In this respect, positive law guarantees that these reasons provide a negative or indirect protection; in other words, they limit the power of dispensation and commutation. The present canon presents the following interpolated clause: "as long as the dispensation does not infringe on the acquired right of a third party."

The doctrine—the theological one in particular—when referring to the power of dispensation of the Roman Pontiff, tends, however, to provide some distinctions, according to which the supreme authority can dispense a real vow:

a) if the promise has been addressed *in incertam personam*, or it has not been accepted by the recipient of a vow;

8. A.M. DE LIGOURI, *Theologia Moralis*, ed. L. GAUDÉ, I (Graz 1954), pp. 533–535.

b) if the vow has been issued *principaliter* to honor God, and *minus principaliter* to the advantage of third parties;[9]

c) and if the Roman Pontiff, due to his supreme jurisdiction, can dispose of the right thus acquired, as is the case when the beneficiary is an ecclesiastical entity, since he is the supreme administrator of its goods (c. 1273; cf. c. 1518 *CIC*/1917).

In all other cases, the Roman Pontiff, cannot dispense (since he does not have *ius alienum laedendi* faculty), and neither can the rest of the authorities, unless the party concerned approves of it.[10]

According to some authors, this power of reservation can be asserted by means of the analogical referral to c. 1203, which provides that the dispensation of a promissory oath, if it damages third parties, can be granted only by the Apostolic See.[11] It does not seem appropriate, however, to establish an analogical relationship between c. 1196 and c. 1203.

In order to clarify the lack of similarity between the vow that damages a third party's right and that which dispenses the promissory oath, thus damaging a third party's oath, it is necessary to consider that a strictly promissory oath is incidental with regard to the main act to which it is attached. In real vows, however, we do not normally find a main part and an incidental one. The subject of the vow knows that, to make it effective, he must express the votive promise or transfer the object to the third party. The obligation of justice that derives from the vow is not capital, but is not incidental either (the way a promissory oath could be); it is intrinsically consequential regarding the vow. For this reason, it is as necessary as the latter, since the promise is attached to the vow like the effect to the cause. The promise made to a third party takes on, in this context, the function of a necessary modality for the real vow to be fulfilled.

Furthermore, in the promissory oath made as a guarantee of a principal act, an eventual dispensation would extinguish only the oath and not the act to which it is attached, if the latter is valid. The dispensation of the real vow that includes a promise to a third party would extinguish both the vow and the promise.

Thus, the vow and the incidental oath present two different cases, whose difference cannot be eliminated or lessened by means of a hermeneutic move of analogical nature. The analogy can be accepted, however,

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9. Ibid., no. 255.

10. A. LEHMKUHL, *Theologia moralis*, cit., pp. 287–288; H. NOLDIN, *Summa Theologiae Moralis*, II, *De praeceptis Dei et Ecclesiae* (Innsbruck 1910), pp. 246–247; E. GENICOT, *Institutiones theologiae moralis*, I (Brussels 1927), p. 255; and, in general, the commentators on the *CIC*/1917.

11. J. MANZANARES, commentary on cc. 1166–1253, in *Salamanca Com*; L. CHIAPPETTA, *Il Codice di diritto canonico*, II (Naples 1988), p. 318.

in similibus when there is not an express legal disposition on the matter on which we draw the analogy.[12]

On the other hand, it seems more plausible that the vow can never be dispensed when the right of third parties is at risk since that right can never be damaged, not even when it is the supreme authority who grants the dispensation, unless the concerned party approves of it, or the right in question is under the complete and legitimate disposition of the authority in charge.[13]

12. Cf. c. 19; cf. also *CIC*/1917, c. 20; G. FELICIANI, *L'analogia nell'ordinamento canonico* (Milan 1968); pp. 5ff and *passim*; in general, G. TARELLO, *L'interpretazione della legge* (Milan 1980), pp. 350ff.

13. R. NAZ, "Voeu," in *Dictionnaire de droit canonique*, t. VII, col. 1623; R.R. THOMAS, "A Vow and an Oath," in *The Code of Canon law. A text and Commentary* (New York-Mahwah 1985), p. 843; J.T. MARTÍN DE AGAR, commentary on cc. 1166–1253, in *Pamplona Com.*

1197 **Opus voto privato promissum potest in maius vel in aequale bonum ab ipso vovente commutari; in minus vero bonum, ab illo cui potestas est dispensandi ad normam can. 1196.**

What has been promised by private vow can be commuted into something better or equally good by the person who made the vow. It can be commuted into something less good by one who has authority to dispense in accordance with can. 1196.

SOURCES: c. 1314

CROSS REFERENCES: cc. 1196, 1202,4°, 1203

COMMENTARY

Silvestro Pettinato

Commutation consists of the replacement of the promised good by another. It is not, strictly speaking, an innovation from the previous duty; in other words, the expiry of the first duty and its replacement by a new one are not verified, but the matter of the first duty is altered: "sola materia mutatur."[1]

Commutation, accordingly, does not absolve the duty of the vow—this was the result of the direct annulment as it was regulated by the *CIC*/1917, c. 1312 § 1, which follows the dispensation—but rather the obligation itself is displaced to a different matter, while the original bond of the vow remains stable.

If the commutation is *in minus*, it can be *redire ad prius*, because it has been granted for the benefit of the subject, with the tacit condition "si ei placuerit"; what has been commuted *in aequale e in maius* can be taken on again, since the subject of the vow is not obliged to use these favors.

It is generally believed that, if the commuted matter becomes impossible, the subject will no longer be bound to the primitive matter, unless the impossibility is the *vovens*'s fault, and the commutation has been performed by him. On the contrary, he is not bound if the commutation was performed (*in minus*) by the authority.

1. D.M. PRÜMMER, *Manuale Theologiae Moralis*, II (Barcelona 1958), pp. 361ff.

Obviously, the commutation that this canon deals with refers to private, personal, and real vows, and can be performed by the subject of the vow, *auctoritate propia,* if the promised good is substituted by an equal or greater one (*in melius*, according to c. 1314 of the *CIC*/1917). It can also be performed by those that have the power to dispense the vow if the commutation is *in minus.*

If the commutation is *in maius* or *in aequale,* a fair cause is not required (a minor cause is considered sufficient). It is necessary, however, for the commutation *in minus* because in this case the commutation acts as *pars dispensationis,* and, as such, cannot be performed by any others than those that have the power of jurisdiction, on condition that the rights acquired by third parties are not damaged (cf. c. 1196 in connection with c. 1197) unless their consent is granted. This condition is also stated in the *Facultas visitandi,* which extends the faculty of commuting, "consideratis causis," all private vows to apostolic nuncios, inter-nuncios, and apostolic delegates, "dummodo commutatio non laedat ius aliis quaesitum."[2]

But the commutations *in melius* and *in aequale* are also subject to this condition, because once the consent of the third party is granted, "exhibenda est res promissa, neque in aliud, etiam melius, ipso invito, commutari potest."[3]

2. SCB, "Facultas visitandi" (January 1, 1968), in X. OCHOA, *LE Ecclesiae post Codicem Iuris Canonici editae,* III (Rome 1972), col. 5285, no. 9.

3. F. SCHMALZGRUEBER, *Ius ecclesiasticum,* III (Rome 1844), p. 155; I. BUCCERONI, *Institutiones,* I (Rome 1914), p. 461; H. NOLDIN, *Summa Theologiae Moralis,* II, *De praeceptis Dei et Ecclesiae* (Innsbruck 1910), p. 252.

1198 Vota ante professionem religiosam emissa suspenduntur, donec vovens in instituto religioso permanserit.

Vows taken before religious profession are suspended as long as the person who made the vow remains in the religious institute.

SOURCES: c. 1315

CROSS REFERENCES: —

COMMENTARY

Silvestro Pettinato

This canon limits suspension to private vows taken before religious profession. This is a norm dictated "ad tollendos scrupulos et difficultates,"[1] and it refers to all vows, not only to those that could become an obstacle or be detrimental to religious life.

This is a legal suspension that acts *ipso iure* and does not require an express act of the superior. It becomes effective as soon as the condition provided by the canon is verified; that is, the entering of the religious profession; the period of novitiate is, however, excluded.

The suspended vows are revived when the interested party ceases to belong to a religious institute.

1. A. VERMEERSCH-I. CREUSEN, *Epitome Iuris Canonici*, t. II (Brussels 1954), p. 455.

CAPUT II
De iureiurando

CHAPTER II
Oaths

1199 **§ 1. Iusiurandum, idest invocatio Nominis divini in testem veritatis, praestari nequit, nisi in veritate, in iudicio et in institia.**

§ 2. Iusiurandum quod canones exigunt vel admittunt, per procuratorem praestari valide nequit.

§ 1. An oath is the invocation of the divine Name as witness to the truth. It cannot be taken except in truth, judgement and justice.

§ 2. An oath which is required or accepted by the canons cannot validly be taken by proxy.

SOURCES: § 1: c. 1316 § 1
§ 2: c. 1316 § 2

CROSS REFERENCES: cc. 380, 833, 876, 894, 1068, 1282, 1455, 1532, 1545, 1562 § 2

COMMENTARY

Silvestro Pettinato

1. *Definition and types of oaths*

An oath is the invocation of God's name as witness to the truth. This canon reproduces the text of the correlative c. 1316 of the *CIC*/1917 literally, and defines the traditional notion of an oath.

An oath is an essentially religious act, and for this reason, an act of worship that constitutes the instrument by means of which the human being, frail by nature, invokes the authority of the divine name, that can, of

its own accord alone, bestow strength and plenitude to the truth that one intends to assert, and grants stability and steadiness for something one has promised to do.

Thus, the two typical forms of oath are described as follows: *assertive*, when God is invoked as a witness to the truth that one tries to assert about past or present things; and *promissory*, when the divine name is invoked as a testimony—according to one thesis[1]—or as a guarantee—"tanquam fidejussor," according to another thesis[2]—to oblige oneself, and to be faithful to the purpose of the promise to do something in the future. From the perspective of the latter type, we should note that generally the promissory oath, although it refers to an action that is still to be performed, also presents an assertive aspect in regards to the present intention to oblige oneself.

For an oath to be valid, the following conditions apply: the capacity of the subject; in other words, the person should be in full command of his faculties (although positive law may provide limitations according to age, status, and profession); and the intention to oblige oneself along with the external expression of that intention.

When the *intentio se obligandi* is missing (what is called a fictitious oath), the oath in the internal forum is considered null, with the corresponding consequences ordered for the moral responsibility of the fiction. The oath can also be bound in the external forum if the appropriate signs or words have been used.

The use of sacramental formulae is not required for the external expression (with the exception of certain circumstances of particular solemnity); it is sufficient that the form used presents, in an appropriate and unequivocal way, a real invocation to God ("I swear by God," "As God is my witness," "I swear by heaven above," etc.). An external form is always necessary for the oath to have its proper effects in the social world.

Another very important aspect, which has created tension and serious theological and juridical problems (see Introduction to this title V: no. 3), is that of the requirements for a licit oath. These requirements are described in Jer 4:2 and are called "comites" by Jerome because they should necessarily accompany any oath: "Simulque advertendum quod jusiurandum hos habeat comites, veritatem, judicium atque justitiam: si ista defuerint, nequaquam erit juramentum, sed perjurium."[3] These requirements include:

— *Truth*: what is asserted as true (in the assertive oath) must actually be true to the best of one's knowledge, or that (in the promissory

1. That of ST. THOMAS AQUINAS: *S.Th.*, II-II, q. 89, a. 7.

2. F. SUÁREZ, *De religione*, Tract. V *De jurejurando*, L. III, c. XVI, no. 10, in *Opera omnia*, ed. C. BERTON, t. XIV (Paris 1859), pp. 717–718.

3. S. EUSEBII HIERONYMI, *In Jeremiam prophetam*, L. I, c. IV, vers. 2, *PL* XXIV, col. 706.

oath) the person who takes an oath is truly committed to binding oneself, and to fulfilling in due time the obligation in question. Truth, in as much as it is considered the chief of these three requirements, does not admit of any appeal to the so called *pure mentalis* restriction that takes place when the subject uses incomprehensible expressions, the meaning of which cannot be deciphered by any means. The person who uses these restrictions commits perjury, which, according to c. 1368, can incur sanctions.[4]

One may appeal to a not purely mental restriction (assuming *late mentalis*, when the real meaning of what is being asserted can be easily inferred, if not from the words, at least from the circumstances of the individual, the time, and place), as long as there is a just cause, that is, the need to take an oath, and there is no other way to avoid an unfair aggression, an improper interrogatory, or any other serious damage; or, finally, when there is sufficient reason to keep a secret.

— *Prudence*: an oath is an act of worship of such importance and commitment that it cannot be taken without due consideration and when there is no need to swear. Thus, prudence is lacking when one resorts to oaths frequently and unnecessarily. This may happen as result of gambling, or when the testimony of the divine name is invoked without due reverence.

— *Justice*: the name of God should not be invoked to support an illegal statement or promise. In the assertive oath it is illegal, for instance, to defame another or to make known, without sufficient reason, a crime; and in the promissory oath, one is forbidden from making a commitment to carry out something dishonest or against the law.

Several canons of the Code prescribe that, in certain circumstances, an oath must be taken. In these cases the oath is sometimes taken in an assertive and sometimes in a promissory manner.

In a judicial field, all those individuals who constitute the tribunal or collaborate with it must take an oath "de munere rite et fideliter adimplendo" (c. 1454). In some cases the parties and the witness must take an oath "de veritate dicenda aut saltem de veritate dictorum" (cc. 1532, 1562 § 2). The individuals mentioned in c. 1455 are bound by oath "ad secretum servandum." Besides the ritual norms, the Code provides for the oaths for administrators of the following ecclesiastical goods (c. 1282): baptism (c. 876), confirmation (c. 894), and for a marriage "in periculo mortis," to swear as to one's free status and absence of impediments (c. 1068). Furthermore, bishops, before taking possession of their office, must make a

4. Regarding the historical development of the problem of mental restriction, cf. E. RUFFINI AVONDO, "Il c. 26 X De sponsalibus et matrimoniis (4, 1). Contributo alla storia della restrictio mentalis in diritto canonico." in *Rivista di storia del diritto italiano* (1933), pp. 2ff.

profession of faith and take an oath of fidelity to the Apostolic See (c. 380), an oath that is extended also to the individuals mentioned in c. 833, and that must be made according to a specific formula.[5]

Other dispositions outside the Code require the oath "de officio rite ac fideliter implendo, atque de secreto servando" for the following: auditors of the tribunal of the Roman Rota (cf. *NSRR*, art. 42); in the procedures concerning the causes of saints; in the procedures for the dispensation of priestly celibacy and for the dispensation *super rato*;[6] and, according to *Regolamento generale della Curia Romana*, the oath of fidelity and observance of the secret of office for the staff of the Roman Curia (RGCR, 18 § 2).

The plurality of forms and contents assumed by the oath can be reduced to the two fundamental types: assertive (i.e., to tell the truth about specific events) and promissory (i.e., to keep the secret, perform the duties of the office faithfully, and, in general, the duty of fidelity). Other classifications—such as those that are normally found in the manuals: invocatory-execratory, simple-solemn, implicit-explicit, judicial-extrajudicial, verbal-real, mixed or integral—are merely descriptive and have no further implications from the juridical point of view.

2. *Exclusion of oaths by means of proxy*

The second paragraph of this canon confirms the rule that was already present in the *CIC*/1917, c. 1316 § 2: the oath required or accepted by the canons cannot be validly taken by proxy.

In this second paragraph the personal character of the oath is manifestly set forth. As the following canon will confirm, it deals with an act of the virtue of religion; therefore the oath, like the vote, is unequivocally personal in both the act and the obligation that is derived from it.

In the old rule, the mediation of a counsel in the presentation of the oath was possible as long as there was no express prohibition to the contrary. In addition, this counsel was supposed to have received a special mandate.[7]

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5. Cf. CDF, *Professio fidei et iusiurandum fidelitatis in suscipiendo officio nomine Ecclesiae exercendo*, in *AAS* 81 (1989), pp. 104ff.

6. Cf. SCDF, *Normae procedurales de dispensatione a sacerdotali coelibatu*, art. 5, in *AAS* 72 (1980), pp. 1136–1137; SCSDW, "Litterae circulares de processu super matrimonio rato et non consummato," art. 11, in *Comm.* 22 (1988), p. 81.

7. F. SCHMALZGRUEBER, *Ius ecclesiasticum* II, p. III (Rome 1844), pp. 279–280.

1200 **§ 1. Qui libere iurat se aliquid facturum, peculiari religionis obligatione tenetur implendi, quod iureiurando firmaverit.**

§ 2. Iusiurandum dolo, vi aut metu gravi extortum, ipso iure nullum est.

§ 1. A promissory oath is determined by the nature and condition of the act to which it is attached.

§ 2. An act which directly threatens harm to others or is prejudicial to the public good or to eternal salvation, is in no way reinforced by an oath sworn to do that act.

SOURCES: § 1: c. 1317 § 1
§ 2: c. 1317 § 2

CROSS REFERENCES: cc. 1191 § 3

COMMENTARY

Silvestro Pettinato

Like the vow, the oath provokes an obligation in conscience founded in the virtue of religion. But, according to Thomist teachings,[1] the obligation of the vow derives from due fidelity to God, who imposes the obligation of fulfilling the promise that has been made to Him. The obligation of the oath "causatur ex reverentia," by virtue of which the person who swears is bound to keep the promises made invoking God's name (to fulfill them). The relationship established by the oath is also different from a subjective point of view, from the one established by the vow. In the case of the latter, there is an immediate relationship between the individual and God (with ulterior consequences provoked by the real vow; see commentary on c. 1193). On the other hand, in the case of the oath, God is not a party but a witness (guarantor) to whatever is asserted or promised.

As a result of its being based on the virtue of religion, the obligation of the oath is represented, like that of the vow, with a connotation of personality; it is a strictly personal obligation. Consequently, no expectation or situation that can be considered as an acquired right may be applied to others from this act.[2]

1. *S. Th.*, II-II, q. 89, a. 8.
2. See, nevertheless, the commentary on c. 1201.

Furthermore, the personal nature of the oath, which can only be assumed by an act of one's own will, precludes the passing on of the corresponding obligation to others by transmission or diffusion. It cannot be communicated by transmission, since the inheritor is not bound to fulfill the provision sworn by the *de cuius* unless this person is subject by a different title (*ex iustitia*).[3] It cannot be communicated by diffusion either because the oath taken by a community (or rather, in a community), even if it has been approved (taken) by the *maior pars*, cannot bind in any way those who have not expressed their consent.

The second paragraph of this canon puts an end to the old and controversial question of the validity of the oath imposed with violence or grave fear. The oath taken *ex metu*, and now also the oath taken because of a deceit of another person, is null *ipso iure*.

The remarkable part of this conclusion is that it expresses a different and better appreciation of the freedom of someone prompted to take an oath in such a way.[4] The *coetus studiorum* reached this conclusion by general assent after c. 68 § 2 of the *schema canonum* proposed the disposition word for word in c. 1317 § 2 of the *CIC*/1917.[5] This disposition considered as valid an oath elicited by violence or grave fear, although such an oath could "a Superiore ecclesiastico relaxari."

The decision taken by the *CIC*/1917 did nothing but reproduce the principle of law provided for in, among other places, a decretal of Alexander III, according to which an oath provoked *gravissimo metu* must be fulfilled, because "non est tutum, quemlibet contra iuramentum suum venire, nisi tale sit iuramentum, quod servatum vergat in interitum salutis aeternae." To support such a rigorous solution, the Alexandrine decretal expresses a serious concern: "Nec nos alicui ex responsione nostra dare volumus veniendi contra iuramentum proprium, ne auctores periurii esse videamur." The *metum patiens*, however, is not in the hands of other people's violence, because the Church tends to free individuals from such an oath "et eius transgressores ut peccantes mortaliter non puniuntur" (*X* II, 24, 8 and 15).

This topic has provoked a long and lively controversy between those who support the validity of the oath *ex metu*, and those who do not consider it binding if the fear is not due to the subject's fault.[6]

3. L. FERRARIS, *Prompta Bibliotheca*, t. IV (Venice 1758), pp. 444–445.
4. P. SPIRITO, "Giuramento (diritto canonico)," in *Enciclopedia Giuridica*, t. XV, p. 2.
5. *Schema canonum De Ecclesiae munere sanctificandi*, pars II (Typis polyglottis Vaticanis 1977), *sub* c. 68 § 2; the *Schema Codicis Iuris Canonici* (Libr. Edit. Vaticana 1980), *sub* c. 1151 is for nullity *ipso iure*: cf. *Comm.* 12 (1980), p. 379.
6. S. KUTTNER, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (Vatican City 1934), pp. 314 ff.

The first thesis, however, is the one that the theological and juridical doctrines normally agreed with by majority consent[7] until it was consolidated in the *CIC*/1917, although during its ascendancy some had a different opinion.[8] For the majority thesis, the Thomist doctrine is particularly relevant. It identifies in the oath taken under duress a double obligation: on the one hand, toward the person to whom something has been promised; on the other hand, toward God, before whom the subject has bound himself to fulfill the promise "per nomen eius." The first obligation is obviously null due to the violence suffered by the individual. Thus, if the provision that was sworn has been fulfilled, one can ask for it to be returned; if it has not been fulfilled yet, the *metuens* is not forced to fulfill it. The second obligation binds in the forum of conscience, but can be dispensed if there is a just cause.[9]

An argument brought forth to support the dominant thesis considered the problem of justifying the disparity between the way the obligation was dealt with in business and in acts (vow and oath). Although they were equally determined by a foundation eminently concerned with the will of the subject, they both presented a general homogeneity that should have led to a uniform treatment.

Thus, for example, an oath taken due to a fear that could affect a constant person binds. A vow made to God, for this very reason, should bind more rigorously than the oath, which is made to human beings. It can be observed, however, that, since the obligation of the vow depends only on the will of the *vovens*, if the person withdraws due to fear, the obligation disappears too. On the other hand, the obligation of the oath neither originates nor depends on the will of the person who swears it, but "ex natura iuramenti resultat ac pendet"; therefore, the obligation to fulfill what has been sworn does not come from the will of the subject, but from the reverence due to the divine name, and this is so no matter the circumstances in which the oath was taken: "quomodocumque id iures."[10]

All things considered, the obligation of the oath *ex metu* should be fulfilled, provided that it does not damage the spiritual health of the individual and provided that the person is *sui compos*; it could, however, be dispensed by the ecclesiastic authority.[11] This was also the solution of *CIC*/1917, c. 1317 § 2.

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7. Cf. the authors, both pro and con, cited by A.M. DE LIGOURI, *Theologia Moralis*, ed. L. GAUDÉ, I (Graz 1954) pp. 480–481.
8. H. NOLDIN, *Summa Theologiae Moralis*, II, *De praeceptis Dei et Ecclesiae* (Innsbruck 1910), p. 263.
9. *S. Th.*, II-II, q. 89, a. 7.
10. D. SOTO, *De iustitia et iure*, L. VII, q. II, a. I, in V.D. CARRO-M. GONZÁLES ORDÓÑEZ (Eds.), *Ed. facsim. de la hecha por D. Soto en 1556, con su versión castellana correspondiente* (Madrid 1968); A. REIFFENSTUEL, *Ius canonicum universum*, t. II (Venice 1735), p. 335.
11. A.M. DE LIGOURI, *Theologia Moralis*, cit., ibid.; L. FERRARIS, *Prompta Bibliotheca*, cit. p. 444, no. 20; A. LEHMKUHL, *Theologia moralis*, I (Freiburg im Breisgau 1896), p. 259.

The freeing effect that in the previous Code relied on the *relaxatio* of the ecclesiastical superior, nowadays is entrusted (*ipso iure*) to the norm contained in § 2 of this canon, which provides the most severe sanction that positive law can provide for the oath caused by violence or fear, outside criminal matters: nullity. Thus, the two acts of the virtue of religion that this canon deals with are also ranked equal where this aspect is concerned.

1201 **§ 1. Iusiurandum promissorium sequitur naturam et condiciones actus cui adicitur.**

§ 2. Si actui directe vergenti in damnum aliorum aut in praeiudicium boni publici vel salutis aeternae iusiurandum adiciatur, nullam exinde actus consequitur firmitatem.

§ 1. A promissory oath is determined by the nature and condition of the act to which it is attached.

§ 2. An act which directly threatens harm to others or is prejudicial to the public good or to eternal salvation, is in no way reinforced by an oath sworn to do that act.

SOURCES: § 1: c. 1318 § 1
§ 2: cc. 1317 § 3; 1318 § 2

CROSS REFERENCES: —

COMMENTARY

Silvestro Pettinato

An oath can be taken as a principal title (in other words, it can be an act that subsists on its own, or is in an isolated state) when it has the mere objective of doing (or abstaining from doing) something, even (although not necessarily) for the advantage of third parties. In this case we are dealing with an oath in a broad sense (simple oath), which takes on the form of the *propositum iuratum,* in which no connotation of its accessory nature can be found.

But the oath can also be taken to reinforce with the *praesidium religionis* an act or a previous relationship that takes, regarding the oath, a main place. This main act can also be a unilateral promise, a vow, or a pact or contract in which the subject who swears is an interested party.

These hypotheses describe the figure of the promissory oath strictly speaking (accessory oath), which are called *promissio iurata, votum iuratum, pactum iuratum.*

The first paragraph of this canon refers to these figures by stating that the promissory oath (strictly speaking) shares the nature and the conditions of the act to which it is attached. Whatever is accessory follows whatever is principal, and the former follows the latter in its nature and in the conditions with which it is presented in the world of

human relationships. It simply shares its nature; it neither modifies it nor transforms it. The promise continues being such, and it follows the rules for its improvement (knowledge and acceptance by the promissory) independently of the oath. The vow preserves its own structure (personal, real, or mixed) and the pact does not change the contents and the object upon which it has been built and finalized. If, in cases other than those of pure business (*actus legitimi*), clauses or other accidental elements (condition, deadline, and manner) have been introduced in the principal act, they remain intact, too.

No further right comes from the promissory oath strictly speaking, but the subject takes upon himself or herself an obligation that is based on the virtue of religion and that has access to the main relationship as a guarantee of its execution.

We do know that from the virtue of religion as such, no rights in favor of third parties arise, but if those rights exist—whether they come from a promise made and accepted with the intention of transferring the good, or from a real vow with a concomitant promise, or from a bilateral relationship—it is obvious that the owner of its title will have his rights consolidated and reinforced by virtue of the guarantee brought by the promissory oath.

The cases that we have been considering so far refer to the principal act, and they presuppose its validity. But if the act were invalid or null, we would have to consider what happens to the accessory act. Can the oath produce an effect of sanation of the invalid principal act?

There should not be any problem in this respect if, as § 2 of this canon provides, the oath is attached to "an act that directly threatens harm to others, or is prejudicial to the public good or eternal salvation." In such cases, the act is not reinforced by the oath because the latter has not been instituted to be "vinculum iniquitatis" as it says in the *Decretum* (*C* XXII, q. 4, c. 22).

It seems appropriate to consider whether a promissory oath can convalidate an act whose power comes from a title different than those indicated in § 2. This amounts to asking whether any trace of the old confirming oath exists nowadays.

The old law recognized the confirming oath up to the threshold of the modern age and the virtual nature of having the invalid act revive (that would accordingly be even judicially executable), as long as it did not damage the common good, did not stem from any morally disgraceful cause, and could be fulfilled *absque peccato*. But positive law does not seem to present any trace of this peculiar mechanism (see introduction to title V, no. 3), according to which, inverting the axiom "accesorium sequitur principale," the principal act (invalid or null) then became accessory, and vice-versa. Other than that, the present canon does not leave any room for doubt in this respect.

Nevertheless, the doctrine expresses on this matter more flexible and articulated positions. First the disposition of § 1 of this canon assigns the promissory oath an accessory nature that can be avoided easily. As a consequence of such an accessory nature, the oath expires when it is attached to an invalid act. However, some authors do not exclude the possibility that at least one confirmation—a completely indirect one—may occur if the interested party, aware of defects in the principal act, wants to substitute the obligation of justice for an obligation of religion, and provided that the objective of the oath is not illicit due to the nature of the thing or by virtue of an express prohibition of the law. If the objective were licit, only the obligation of religion would result from the oath.[1] In other words, the case of the accessory oath would no longer be configured, but rather the assumption would be made of a new commitment under the species of a promissory oath simply or broadly construed.

1. A. VERMEERSCH, *Theologiae moralis principia, responsa, consilia*, II (Rome 1945), p. 138; B. GUINDON, *Le serment, son histoire, son caractère sacré* (Ottawa 1957), p. 199; P. FEDELE, "Giuramento," in *Enciclopedia del Diritto*, t. XIX, p. 170.

1202 **Obligatio iureiurando promissorio inducta desinit:**

1° si remittatur ab eo in cuius commodum iusiurandum emissum fuerat;

2° si res iurata substantialiter mutetur, aut, mutatis adiunctis, fiat vel mala vel omnino indifferens, vel denique maius bonum impediat;

3° deficiente causa finali aut condicione sub qua forte iusiurandum datum est;

4° dispensatione, commutatione, ad normam can. 1203.

The obligation of a promissory oath ceases:

1° if it is remitted by the person in whose favour the oath was sworn;

2° if what was sworn is substantially changed or, because of altered circumstances, becomes evil or completely irrelevant, or hinders a greater good;

3° by the cessation of the purpose or the condition under which the oath may have been made;

4° by dispensation or commutation in accordance with can. 1203.

SOURCES: 1°: c. 1319, 1°
2°: c. 1319, 2°
3°: c. 1319, 3°
4°: c. 1319, 4°

CROSS REFERENCES: cc. 1194, 1203

COMMENTARY

Silvestro Pettinato

Unlike the vow, the oath[1] can be remitted by the person in whose favor it was sworn. This remission is valid and licit because, as it has been noted, although the promise was made in God's name, it depends, nevertheless, on the will of the beneficiary of the oath.[2] This is also true of the oath taken in favor of another and accepted by a third party since it is only

1. For everything relative to the provisions of this canon, see the considerations set forth in the commentary on c. 1194; also as regards the suppression of the term "direct annulment," foreseen by c. 1313 *CIC*/1917, as the cause of cessation of the oath.
2. R. NAZ, "Serment promissoire," in *Dictionnaire de droit canonique*, t. VII, col. 993.

in this case that it is attached to the relationship between two individuals as an accessory act.

We should notice regarding no. 2° of this canon that there is supposed to be a notable change of the matter or of the circumstances that determined the assumption of the commitment for the oath to cease. Thus, the oath also ceases if the matter of the oath becomes illicit or useless, or if its fulfillment impedes a greater good. It is not always true, however, that a greater good will justify the cessation of the oath; if it is accessory to a principal relationship, and, consequently, it is attached to as a guarantee, the subject is bound to fulfill "quamdiu honestum sit,"[3] even if its fulfillment were to impede a greater good.[4]

One change to be noted regarding the effects of this disposition is that, had it been verified beforehand, it would have impeded the oath.

Not only the cessation of the cause, but also the non-verification of the condition without which the person would not have sworn can make the obligation of an oath cease.

Finally, the oath ceases by dispensation and by commutation pursuant to the terms in c. 1203 (see commentary).

3. A. VERMEERSCH-I. CREUSEN, *Epitome Iuris Canonici*, t. II (Brussels 1954), p. 459.
4. J.T. MARTÍN DE AGAR, commentary on. 1202," in *Pamplona Com.*

1203 **Qui suspendere, dispensare, commutare possunt votum, eandem potestatem eademque ratione habent circa iusiurandum promissorium; sed si iurisiurandi dispensatio vergat in praeiudicium aliorum qui obligationem remittere recusent, una Apostolica Sedes potest iusiurandum dispensare.**

Those who can suspend, dispense or commute a vow have, in the same measure, the same power over a promissory oath. But if dispensation from an oath would tend to harm others and they refuse to remit the obligation, only the Apostolic See can dispense the oath.

SOURCES: c. 1320

CROSS REFERENCES: cc. 1195, 1196, 1197

COMMENTARY

Silvestro Pettinato

This canon refers us to the dispositions of the following canons: 1195 regarding suspension, 1196 regarding dispensation, and 1197 regarding commutation.

Concerning the subjects and the modalities in the exercise of the corresponding power (*eadem ratione*), this canon repeats the previous canon with just one exception in regard to dispensations. Consequently, the considerations made regarding suspension, dispensation, and commutation of the vow are valid in this case (see commentary on cc. 1195, 1196, and 1197), taking into account the points we shall make regarding the cited exception.

One should notice above all that the dispensation of an assertive oath cannot be granted, because its matter, "which refers to the past and present, has entered into the domain of the necessary and is already immutable."[1]

The promissory oath can be dispensed, but one must distinguish two different types: the simple oath (*late promissorium*) can be dispensed by the authorities indicated in c. 1196; the dispensation of the accessory oath (*stricte promissorium*), however, is subject to a special discipline if there is an injury to a third party.

1. *S. Th.*, II-II, q. 89, a. 9.

Regarding the real vow, we must take into account (see commentary on c. 1196, no. 2) that the power of dispensation stops when a right (*ad rem* or *in re*) in favor of a third party derives from the vow (from the concomitant promise). This is not the case for accessory oaths, which can be dispensed, but only by the Apostolic See if the dispensation results in damage to others who refuse to pardon the obligation.

Canon 1320 of the *CIC*/1917 imposed on this power reserved to the Holy See the limitation of necessity or usefulness for the Church, a limitation that disappeared in the contemporary version, which allows for the dispensation's causality to encompass the private reasons and needs of the applicant.

In the doctrine previous to the first codification there is, however, no lack of positions that tend to an integral comparison between the vow and the oath, with both of them being considered as non-dispensable, even by the Roman Pontiff, when the third party does not renounce his or her right.[2]

The difference between the discipline of the dispensation from the vow and the oath can be explained (see commentary on c. 1196) by a crucial circumstance: the dispensation of the vow with a right of a third party is not allowed because it would result in an ablative measure for the right of the other (whether it is a natural right, or a positively recognized one), and, consequently, would lead to an outcome beyond the reach of ecclesiastical power, according to the common doctrine.

The dispensation of the accessory oath, on the other hand, has been enabled by positive law because it does not affect the principal act, but affects what the accessory act means, in other words, the personal guarantee by means of which the third party has his or her own right reinforced. The dispensation eliminates this guarantee, consequently, weakens the reasons of the third party, and thus, "harms" it (it does not damage it). For this reason, in the absence of a pardon, renunciation, or consent of the interested party, this freeing measure cannot be granted by any authority except the Apostolic See.

These notes also explain the reason why this exception (that allows for the dispensation) cannot be extended to the commutation. Taking into account the discipline of c. 1197 (see commentary), the commutation can be performed—when it affects the right of a third party, provided he or she gives consent—*in melius* or *in aequale* by the subject himself or herself, and *in minus* by the authority that is authorized to dispense. But, if third party consent is lacking, the commutation cannot take place because, unlike the dispensation for the accessory oath, the commutation

2. H. NOLDIN, *Summa Theologiae Moralis*, II, *De praeceptis Dei et Ecclesiae* (Innsbruck 1910), p. 266; I. BUCCERONI, *Institutiones*, I (Rome 1914), p. 436.

acts upon the object of the promise or of the pact—what is commuted is the "opus ex quovis iuramento assumptum."[3] Otherwise, one would reach a juridically aberrant conclusion: to allow interference (on the side of the party or the commuting authority) in an obligatory relationship that has already been defined, to introduce into it a modification unilaterally and *invita altera parte.*

3. SCB, *Facultas visitandi* (January 1, 1968), in X. OCHOA, *LE post Codicem Iuris Canonici editae,* III (Rome 1972), col. 5285, no. 10.

1204 **Iusiurandum stricte est interpretandum secundum ius et secundum intentionem iurantis aut, si hic dolo agat, secundum intentionem illius cui iusiurandum praestatur.**

An oath is subject to strict interpretation, in accordance with the law and with the intention of the person taking the oath or, if that person acts deceitfully, in accordance with the intention of the person to whom the oath is made.

SOURCES: *c.* 1321

CROSS REFERENCES: cc. 18, 36, 77, 92

COMMENTARY

Silvestro Pettinato

The hermeneutic criteria presented in this canon (cf. *CIC*/1917, c. 1321) are in line with canonical tradition, which imposes a strict interpretation for all acts, norms and provisions that entail a voluntary or authoritative restriction of the juridical sphere of the individual.

The following acts, norms, and provisions require strict interpretation: laws that impose a penalty, restrict the free exercise of rights or present an exception to the law (c. 18); administrative acts that meet the requirements indicated in c. 36; and dispensation and proper power to dispense (c. 92).

The oath must be interpreted according to law, and in accordance with the intention of the person who took it, if acting in good faith. To interpret the oath according to law may entail taking each word at its juridical meaning.[1] We should remember, however, that the promissory oath (on which the hermeneutic operation is based, after all) can be taken as the principal title; in other words, it can be what we call a promissory oath in the simple or wide sense. In this case, the criterion that we have just presented can be used to ascertain, by analyzing the juridical meaning of the words used, the quality of the obligation assumed by the person who takes the oath.

In the case of a promissory oath in a strict sense (an oath that is accessory to a principal act that is already defined and regulated by law), the accessory oath will follow subjective criteria and the objective norms

1. R. NAZ, "Lieux et temps sacrés," in *Traité de droit canonique*, t. III, l. III (Paris 1948), p. 122.

applicable to the interpretation of the principal act, but it will favor a "strict" result, in other words, more favorable to the person who takes the oath.

In any case, the main goal of this hermeneutic activity is to clarify the juridically binding content of the will of the subject who "freely" (c. 1220 § 1) assumes the obligation of religion. Thus, the quality and entity of the oath is decided not only *secundum ius*, but also in accordance with the intention of the person who takes an oath, expressed in an appropriate way. With this interpretation in view, classical canonical tradition transmitted, by elaborating a system of implicit conditions, the original and valuable notion that a legal criterion (*secundum ius*) and a subjective one (*secundum intentionem iurantis*) can be combined and integrated into an approach that performs a hermeneutic analysis informed by the *favor iurantis.*

The general principle of interpreting in favor of the person who takes the oath ("benignius interpretari volentes," *X* II, 24, 25) logically takes a central position in the system of the *conditiones subintellectae*, which can obviously affect only the promissory oath since "in assertoriis autem nulla conditio suauditur."[2]

The implicit resolving conditions—that are neither unmotivated nor arbitrary but generally deduced from the dispositions of positive law or those of the *regulae iuris*—offer help to correct, integrate, or delimit the range of the obligatory effects that can lead to the intentions of the person who takes the oath and, provided the person acts in good faith, are considered as (implicitly) added to the promissory oath, even *absolute facto.*[3]

The most common among these resolving conditions are: *si (commode) potero* (no one is forced to things that are morally or physically impossible or excessively burdensome); *salvo iure et auctoritate superioris; nisi is, in cuius favorem iuratum est, sponte remiserit; res in eodem statum permanserit; si et altera pars fidem servaverit* (in relationships with reciprocal provisions); the oath to observe the statutes of a community, unless it explicitly says otherwise, refers only to the statutes already in force, and does not extend *ad futura*. Other conditions are commonly added to these implicit ones—Hostiense, in his commentary on c. *Quemadmodum* (*X* II, 24, 25), provides a list of up to sixteen—the aim of which is always to enable one to reconstruct, in a manner favorable to the subject and useful to the legislator, the intention of the person who took the oath.

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2. HOSTIENSE, *In sex libros decretalium commentaria, comm. ad X* II, 24, 25 (Venice 1581) (ed. anast. Turin 1965), fol. 133.
3. L. FERRARIS, *Prompta Bibliotheca*, IV (Venice 1758), pp. 441–443.

PARS III
De Locis et Temporibus Sacris

Part III
Sacred Places and Times

INTRODUCTION
Adolfo Longhitano

I. THE TOPIC IN THE SYSTEMATIC PRESENTATION OF THE CIC

Part III, dealing with sacred places and times, closes book IV of the Code, which deals with the Church's function of sanctification. Although this title may seem to reproduce *CIC*/1917, the truth is that the legislator introduces some new elements regarding both the theological notion underlying these canons and the subject matter.

Regarding the theological notion, the Code appropriates the innovations introduced by Vatican Council II, innovations that can already be appreciated in the title of the book; sacred places and times are no longer included among "things," but are in the "Church's sanctifying function." Regarding the subject covered, since the subject of ecclesiastical funerals has already been covered in cc. 1176–1185, the argument can be developed in a more rigorous and homogeneous way, devoting five chapters to places (churches, oratories, and private chapels, sanctuaries, altars, cemeteries) and two to sacred times (festivities, days of penance).

II. THE DIFFICULT NOTION OF THE *SACRED* IN THE HISTORY OF RELIGIONS

"Few notions are as ambiguous as that of the 'sacred'." In 1967, Y. Congar began an essay with this statement, commenting on the Council's Constitution on the liturgy, an essay in which he attempted to

evaluate the situation of the sacred in Christianity,[1] Twenty-five years later, this problem continues to be a highly topical subject and still presents many questions to those who study ecclesiastical disciplines in general and to canonists in particular: is it possible to provide a clear and exhaustive notion of the sacred? Have the doctrinal indications given by Vatican Council II been received by the Church? How should we interpret the canons of this part III of book IV of the Code?

The *sacred* seems to be, most of all, correlative to the *profane*, and it is due to the fact that human beings can only have a mediated experience of the divine.[2] In any situation that is considered to be sacred, there is a certain manifestation of the divine (hierophany). The sacred manifests itself as something different from the profane. In any case, the terms *sacred* and *profane* do not have analogous meanings in different cultures. On reading Egyptian, Babylonian, or Ugaritic religious literature, we may be tempted to think that these eastern peoples had a conception of the sacred and the profane similar to that of the Hebrew people. The truth is that we are dealing with a language that has a distinctly different meaning, because the Hebrew notion of God as the creator and the world created by Him is distinctly different.

1. *The sacred and the profane in pagan religions*

In eastern cosmogonies, there is no monotheistic conception of divinity, and the world is the result of a battle between two gods: the good god that triumphs over the bad god. The world has its origins in the downfall of the divine. The notion of a personal and transcendental God who has created the world is also unknown in Greco-Roman cosmogony. In this view, gods are only the personification of forces of nature; nature is

1. Y.M-J. CONGAR, "Situation du 'sacré' en régime chrétien," *La liturgie après Vatican II. Bilans, études, prospective* (Paris 1967), pp. 385–403. For an analysis of the concept of the sacred in Christianity cf. O. PROCKSCH, "Hágios," in G. KITTEL-G. FRIEDRICH, *Grande lessico del Nuovo Testamento* (=*GLNT*), I (Brescia 1965), cols. 234–310; G. SCHRENK, "Hierós," ibid., IV (Brescia 1968), cols. 739–910; J.P. AUDET, "Le sacré e le profane: leur situation en christianisme," in *Nouvelle revue théologique* 79 (1957), pp. 2–61; M.D. CHENU, "Consecratio mundi," ibid., 86 (1964), pp. 608–618; G. DE ROSA, "'Sacro' religioso e 'sacro' cristiano," in *La Civiltà Cattolica*, 124 (1973) IV, pp. 335–346; E. CASTELLI (Ed.), *Il sacro. Studi e ricerche* (Rome 1974); E. SIMONS, "Luoghi e tempi sacri," in K. RAHNER (Ed.), *Enciclopedia teologica "Sacramentum mundi,"* IV (Brescia 1975), pp. 851–854; J. SPLETT-K. HEMMERLE, "Il sacro," ibid.,VII (Brescia 1977), cols. 310–318; A.N. TERRIN-D. SARTORE, "Sacro," in D. SARTORE-A. TRIACCA (Eds.), *Nuovo dizionario di liturgia* (Rome 1984), pp. 1303–1318; M. MESLIN, "Mito e sacro," in B. LAURET-F. REFOULE (Eds.), *Iniziazione alla pratica della teologia*, I (Brescia 1968), pp. 64–87.

2. For the topic of the sacred in the history of religion, cf. in particular: R. OTTO, *Il sacro. L'irrazionale nella idea del divino e la sua relazione al razionale*, 2nd ed. (Turin 1976); J. GRAND'MAIONS, *Il mondo e il sacro* (Rome 1965); M. ELIADE, *Il sacro e il profano*, 2nd ed. (Turin 1973); A.M. DI NOLA, "Sacro e profano," in *Enciclopedia delle religioni* (=*EdR*), V (Florence 1973), cols. 678–710; J. RIES, *Il sacro nella storia religiosa dell'umanità* (Milan 1982).

frequently perceived to be unfaithful, and this forces mankind to be on guard and to seek protection from the gods.

As a result of this negative connotation, the profane world is synonymous with chaos and pseudo-reality; it is a world that presents certain gaps in the realm of the ontological, a world that is missing a fundamental positive nature. Consequently, the sacred-profane opposition often results in the dichotomy of real-unreal. Nevertheless, this profane world, synonymous with chaos, can turn into cosmos when it becomes sacred.

The sacred is conceived as a new world, one that acquires a positive nature that did not originally belong to it. The sacred is equivalent to power and is perceived as reality *par excellence*; sacred power simultaneously means reality, perennial nature, and efficacy. One can therefore understand why mankind struggles to consecrate the reality in which it lives. Consecration transforms chaos into cosmos, so that it loses its negative connotation and allows mankind to acquire the confidence and security that it needs. But, at the same time, the consecration amounts to a "setting aside," a separation. The consecrated reality is removed from common usage to be reserved for the divinity; any one who dares to touch it or use it, can bring upon himself punishments and adversities.[3]

The notions of sacred place and time fit nicely into this conception of divinity and of the world.

a) *Sacred places*

For primitive people and for many pagan religions, space is a reality that does not present itself homogeneously; it presents fractures and discontinuity. The sacred place, since it implies a hierophany, effects the separation of a territory from the world that surrounds it, making it qualitatively diverse. We can consider this a place with a vertical orientation that ensures the communication between the world and the divinity. There is, consequently, a clear distinction between the sacred place and the surrounding space; the divine power manifests itself in the sacred place, and mankind has the opportunity to enjoy a singular experience in which his being is enriched with extraordinary force.

Profane space is, on the other hand, amorphous and treacherous. This is why mankind, realizing the need to live in an atmosphere impregnated by the sacred, resorts to different techniques to consecrate a profane space: techniques of orientation or of construction, which are not the result of human labor, but an effort to reproduce the work of the gods. Sacred architecture is nothing other than an effort to assume and develop a form of cosmological symbolism; the temple is the reproduction on earth of a divine model.[4]

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3. M. ELIADE, *Il sacro…*, cit., pp. 13–18; A.M. DI NOLA, "Creazione, cosmogonia, origine del mondo e dell'uomo," in *EdR*, II (Florence 1970), cols. 446–461.

4. M. ELIADE, *Il sacro…*, cit., pp. 19–46; A.M. DI NOLA, "Spazio e spazi religiosi," in *EdR*, V (Florence 1973), cols. 1250–1259.

b) *Sacred times*

Likewise, time is neither homogeneous nor continuous. In one dimension, there is profane time, in other words, the normal duration of ordinary acts. In another dimension, there is sacred time, in other words, the primordial, mythical time, the time of creation, sanctified by the presence of the divinity. Humankind tries to make sacred time present again in the celebration of festivities. Participating in a festivity entails stepping out of profane time to immerse oneself in the time created and sanctified by the gods, a time that does not pass, that is always equal to itself, that does not change and never becomes exhausted. The yearly repetitions of the cosmogony in Babylonian religion are relevant here; by ritually repeating the mythical battles between the divinity and the sea monster, primordial time is reestablished at the beginning of a new year. The destructive, profane time had worn out mankind, society, and the cosmos. It was necessary to overturn this destructive force and to reintegrate sacred time.[5]

2. *The sacred and the profane in the Old Testament*

The Scriptures reveal a single personal and transcendental God, even though they evidence the obvious influence of religious notions of neighboring peoples. In the creation of the world, God acts alone and deliberates only with Himself. His victory over chaos is not the success of a real battle. The abyss is not an evil deity; here it is not a matter of monsters, nor of demons defeated or chained up by God.

Creation is a spontaneous act of an omnipotent God who acts according to a plan designed to favor mankind who was created in his image. The world is God's work, and it expresses his goodness, depends on Him, is governed by Him, and is integrated in the plan of salvation that has mankind at its center. It is mankind who has dominion over everything, names the animals (Gen 1:28–30; 2:19–20) and is called upon to continue the work of God (Gen 2:15).[6]

The term *sacred* cannot be attributed at the same time to God and to the realities created by Him. God is holy (Is 6:3) and transcends both the sacred and the profane. Those created realities (things, words, people)

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5. M. ELIADE, *Il sacro...*, cit., pp. 47–74; A.M. DI NOLA, "Tempo," in *EdR*, V (Florence 1973), cols. 1689–1702.

6. W. FOERSTER, "Ktízô," in *GLNT*, V (Brescia 1969), cols. 1235–13330; H. GROSS-F. MUSSNER-W. KERN, "Esegesi teologica di Gen 1–3," in J. FEINER-M. LOEHRER (Eds.), *Mysterium Salutis* (=*MS*), IV (Brescia 1970), pp. 31–88; P. SMULDERS-K. RAHNER, "Creazione," in K. RAHNER (Ed.), *Enciclopedia teologica...*, cit, II (Brescia 1974), cols. 669–690; G. COLOMBO, "Creazione," in G. BARBAGLIO-S. DIANICH (Eds.), *Nuovo dizionario di teologia* (Alba 1977), pp. 184–210; J. BERGMAN-H. RINGGREN-K.H. BERNHARDT-G.J. BOTTERWECK; "Bara," in J. BOTTERWECK-H. RINGGREN (Eds.), *Grande Lessico dell'Antico Testamento*, I (Brescia 1988), cols. 1566–1582.

through which mankind experiences the divine are sacred.[7] But the divine is not the same as the sacred, which has an intermediate position between mankind and the divine, and is totally on mankind's side.

The profane is that part of the world in its natural state that does not have any negative connotation, and cannot be devalued by the fact that it does not participate in the experience of the divine. The world has its own ontological consistency and its own autonomy. Even though the Bible warns us against an overvaluation of the world (in its present state and in solidarity with the sinner) and invites us to wait for the arrival of the eschatological Kingdom in which creation will reach its climax (Rom 8:19), it does not identify the profane with sin, as if the profane were nothing other than the corruption of the sacred.[8]

a) *Sacred places*

In the period of the Patriarchs, the Hebrew people believed that some of the places where God had manifested Himself were sacred: Shechem (Gn 12:7), Bethel (Gn 12:8; 35:1 and 7), Beersheba (Gn 26:24–25), the Sinai (Ex 3:1–6; 19:16–20), etc. In the years of the exodus, a portable sanctuary (the tabernacle) made God present in the middle of his people, and reminded them of the covenant stipulated on Mount Sinai (Ex 26–27).

When the Hebrew people established themselves in the territory of Canaan, a common sanctuary was built, first in Gilgal and then in Shechem (Jos 8:30–35) and Shiloh (1 Sm 1–4); but the Hebrews were careful to avoid any reference to the pagan sanctuaries of the Canaanites.

David's project to build a temple in Jerusalem met with the opposition of a specific prophetic tradition, expressed by Nathan (2 Sm 7:1–16). At the heart of this disapproval was probably a reference to the tabernacle of the exodus, which had to constitute the ideal model of the temple, and the fear that the sacred building, among a people that was not sufficiently mature, could become a servile copy of the pagan temples in which one could supposedly exercise control over the deity. David's design of the temple was carried out by his son Solomon and acquired a precise meaning: it was a sign of the presence of God among his people; no one was supposed to believe that God would restrict himself to this sensible sign of his presence (1 Kgs 8:27–29).[9]

7. O. PROCKSCH, "Hágios," cit.; P. MOLINARI, "Santo," in S. DE FIORES-T. GOFFI (Eds.), *Nuovo dizionario di spiritualità* (Rome 1979), pp. 1369–1386.

8. H. SASSE, "Kósmos," in *GLNT*, V (Brescia 1968), cols. 875–958; G. HAEFFNER, "Mondo," in K. RAHNER (Ed.), *Enciclopedia teologica…*, cit., V (Brescia 1976), cols. 467–481; G. BOF, "Mondo," in G. BARBAGLIO-S. DIANICH (Eds.), *Nuovo dizionario…*, cit., pp. 945–961.

9. O. MICHEL, "Naós," in *GLNT*, VII (Brescia 1971), cols. 849–878; Y. CONGAR, *Il mistero del Tempio* (Turin 1963), pp. 33–69.

b) *Sacred times*

The Creation marks the beginning of time and of history, which does not follow the law of eternal regression, but rather is ultimately guided by God's plan, which manifests itself and reaches its fulfillment in Creation. While in pagan religions, historical time is sacred in as much as it reproduces the primordial story of the gods, in biblical revelation, the sacred nature of historical time derives from God's interventions, which become *kairoí* for mankind, in other words, propitious times, and constitute sacred history.[10]

We find here a unitary plan of salvation acted out in history, in which the different stages, each one of which has a specific meaning, follow one another step by step and contribute something new in order to achieve its plenitude. Festivities celebrate God's main interventions in history: the Creation is celebrated on the Sabbath (Ex 20:11), the exodus on Passover (Dt 5:12–15; 16: 1), the journey through the desert on the feast of Tabernacles (Lv 23:42), the gift of the law of Sinai on Pentecost.[11]

c) *Toward overcoming the sacred*

It is important to notice the special pedagogical action existing in the relationship that God established with his people. This pedagogical action had the goal, over a long period of time, of creating a new mentality coherent with faith and suitable for determining practices and behaviors distinct from those that were normal among neighboring peoples. This action reached its climax in Christ's teachings, which had the goal of surpassing the law of Moses by bringing about radical forms of desacralization. This is why when confronting the problem of the sacred in the Bible, one must distinguish between the Old and the New Testament, between the juridical norms and rituals that prepare the coming of Christ and the novelty that must characterize the practice and behavior of Christian people.

Even within the different meaning that the sacred acquires in the biblical conception, the Old Testament is characterized by a sacred regimen that presents many analogies with its contemporary cultures: God chooses a people with whom He establishes a covenant based on the law; Israel is a consecrated people, separated from other, idolatrous peoples, bound to follow precise norms of behavior that regulate their relationship with Him. The most notable of these norms are the laws regarding purity that determine the conditions under which the people and the priests can be pleasing to God (Lev 11–15). All the land given by God as a gift to his people is holy land, but Jerusalem is the holy city *par excellence*, because

10. G. DELLING, "Kairós," in *GLNT*, IV (Brescia 1968), cols. 1363–1390; idem, "Chrónos," ibid., XV (Brescia 1988), cols. 1091–1126; no. BROX, "Tempo," in H. FRIES (Ed.), *Dizionario teologico*, III (Brescia 1968), pp. 453–460.

11. D. SESBOUE-M.F. LACAN, "Feste," in X. LEON-DUFOUR (Ed.), *Dizionario di teologia biblica*, 4th ed. (Turin 1971), cols. 394–397; S. MOGGIANI, "Festa/Feste," in D. SARTORE-A.M. TRIACCA (Eds.), *Dizionario*..., cit., pp. 555–581.

there God established his dwelling (Ps 76:3), and this was the place where his temple was built. The temple is built on a site the sacred nature of which increases the more it attaches itself to the Holy of Holies (1 Kgs 6:16). The sacred times were the festivities (particularly the Sabbath), along with the religious services prescribed for each one of them, and the meticulous norms that indicated which activities and behaviors were allowed and which were forbidden (Ex 20:8–11; 23:14–19).

The pedagogical meaning of the sacred was often forgotten by the Hebrew people, and the prophets would constantly remind them of it: the observance of the precepts of Moses could not be reduced to a mere externalization, but should help them to live the content of the faith; worship should be rendered to God, not with a merely formal purity, but with a purity of the heart (Is 29:13; Am 5:21–27).[12]

3. *The sacred and the profane in the New Testament*

The ideal proposed by the prophets was brought to completion by Jesus according to a plan of de-sacralization of persons, places, and times. For instance, Samaritans had been excluded from the people of Israel, but Jesus approached them and in some cases presented them as models of charity and gratitude (Lk 10:33; 17:16). Among the apostles, Jesus chose Levi, a publican, and agreed to sit at the table with his other publican friends (Mt 9:9–13). The sermon on the mount represents at the same time the surpassing and the fulfillment of the law of Moses. Sanctity cannot be relegated only to a moment or a part of an individual's life, but to its totality, and also to the secret regions of the heart (Mt 5).[13]

Most of all, the de-sacralization was absolute as far as the priesthood and the temple were concerned; this is one of the main points addressed by the Letter to the Hebrews. A new kind of priesthood came into practice with the arrival of Christ (Heb 7:11–28). The sacrifices of the old law were only a prefigurement of the sacrifice of Christ, who with his own blood freed people from sin (Heb 9:9–14). His sacrifice is offered outside the city and far from the temple (Heb 13:12), so that the Jews could not claim it for themselves and to emphasize that it was offered for the whole world; thus, Jesus purified the entire earth, and made any place appropriate for prayer.

There is accordingly a heavenly temple, which is finally the real one, and which corresponds to Christ's new and heavenly priesthood (Heb 9:12). In the Holy of Holies, which is the place of future good, Christ, our eternal High Priest, has entered as the forerunner of a new people (Heb 9:24–26). The sacred regimen of the temple, which was exclusively

12. Y.J.-M. CONGAR, "Situation…," cit., pp. 386–388.
13. Ibid., 389–392.

serviced by a priestly caste, is substituted by the body of Jesus (Jn 2:19–22; Heb 9:11–14).[14]

In his dialogue with the Samaritan woman, Jesus asserts that prayer and communion with God are no longer dependent on location (Jn 4:21and 23). The norms concerning the Sabbath cannot be made absolute to the point of forgetting the value of the human person (Mk 2:28).

One may, in short, affirm that Jesus abolished the category of the sacred understood as a separation from the profane and has given a new meaning to the profane: that it can be sanctified (not consecrated). Everyone can have access to God in Christ (Gal 3:28); everyone is a member of his priestly body (1 Cor 12:12–27); worship consists of a life modeled by the will of God (Mt 7:21); and daily life is acceptable to God if it is guided by charity (Mt 25:31–46).[15]

4. *The Church and the sacred*

Jesus' work of de-sacralization should not lead one to think that the problem of the sacred is already solved. The Church, in fact, notices that she is different from the world and is aware of her duty to administer some gifts received from Christ for the salvation of the world, gifts that cannot be considered profane. Hence, we once more find the question of the sacred, which is no longer analyzed in the context of the Creation but in the context of redemption. God's creative action has concluded (natural order). Salvation is a free gift that establishes a different economy (supernatural order).[16]

In the realm of salvation, the category of the sacrament is very important, since it allows us to consider the divine and the human, the historical and the transcendent, in the context of their specific nature and their inseparable relationship. God uses visible and historical realities to manifest and effect his action and his gifts. Consequently, it is necessary in the salvific action to distinguish between these two elements, their different nature, and their specific action. The visible element is functional and relative; it is God who causes the grace in the mediation with the visible element.

If we take into account the due importance of this twofold element of God's salvific action, it is necessary to exclude at the same time a

14. C. SPICQ, *L'épître aux Hébreux* (Paris 1957); O. KUSS, *La lettera agli Ebrei* (Brescia 1966); M.M. BOURKE, "L'epistola agli Ebrei," in R.E. BROWN-J.A. FITZMYER-R.E. MURPHY, *Grande commentario biblico*, (Brescia 1973), pp. 1323–1352; Y.M-J. CONGAR, *Il mistero...*, cit., pp. 135–176; A. VANHOYE, *Sacerdoti antichi e nuovo sacerdote secondo il Nuovo Testamento* (Turin 1990).

15. Y.J.-M. CONGAR, "Situation...," cit., pp. 309–392; J.P. AUDET, "Le sacré...," cit., pp. 48–53.

16. M.D. CHENU, "I laici e la 'consecratio mundi'," in G. BARAUNA (Ed.), *La Chiesa del Vaticano II* (Florence 1963), pp. 978–993, especially 982–985.

magical obsession, which entails the objectification of the sacred, and all those forms of idealism that adopt a meta-historical position. As long as the Church continues its pilgrimage throughout time, it will need these visible and historical mediations; accordingly, it will not be able to do without certain "sacred" realities which, under different titles, allow it to receive God's gifts and act as the mediator of salvation.

In the category of sacrament, we find several realities of varying nature, which manifest and effect God's salvific action and his gifts in different ways and at different levels: Jesus Christ, who is the sacrament par excellence because he makes the Son of God visible and operational in history in his human nature; the Church that continues throughout time its work of salvation; the sacraments as privileged moments of salvific encounter with Christ; and a whole series of human realities that refer to God and to his salvific action.[17]

These realities can be considered as sacred precisely because they allow us to experience the divine; but it is not possible to conceive their sacred nature in a similar manner, taking into account that that sacred nature can refer to Christ, to the Church, to the sacraments, or to other human realities, that in one way or another refer to God and to his work of salvation.

Congar distinguishes four levels of the sacred when analyzing the supernatural order:

a) the sacred defined as "substantial" in the Body of Christ, which is at the same time temple, priest, and sacrifice;

b) the sacred in sacramental signs, such as sacraments and human situations that originate in them, and above all in baptism, confirmation, orders, and marriage;

c) the group of signs that express or facilitate religious relationships with God and with Christ. These signs can constitute the category of the sacred/pedagogical, the ambit of which is very large, including words, gestures, traditions, rules of communal life, places for the celebration of worship, days or specific moments, and realities that aim to improve our relationship with God and with our brethren. These signs should be considered as functional because they aim to achieve a specific good. It is evident that the sacred in these realities does not entail disdain for the profane; for instance, a sacred building does not attach a negative connotation on the profane space that surrounds it; Sunday, the day of the Lord, does not make the other days of the week ill-fated; monastic life does not entail the devaluation of the ordinary life of a Christian, etc.;

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17. E. SCHILLEBEECKX, *Cristo sacramento dell'incontro con Dio*, 8th ed. (Rome 1981); O. SEMMELROTH, "La Chiesa come sacramento di salvezza," in *MS*, VII (Brescia 1972), pp. 378–437.

d) the things that we use in our daily life, that can and must be sanctified if they are used according to God and his will. These are realities that are intrinsically profane, which do not change in nature when they are used by Christians in a holy way: work, material goods, entertainment, etc.[18]

Taking into account the ambiguity of terms such as *sacred* and *to consecrate* in the history of religions, and at a time when the phenomenon of secularization is particularly intense,[19] it has been strongly proposed that these terms be used with extreme care, or even completely avoided. Consequently, many authors assert that one can no longer go on speaking of sacred places and times, sacred art and music, etc.[20] The terminological question aside, the problem of how to live this dimension in the different levels described before is not of marginal importance for the Church, which must continue to be faithful to God's plan.

5. *Sacralization and magic*

Christian communities did not always understand that the message of Christ entailed the overcoming of the Jewish mentality. Furthermore, the influence of philosophical concepts or practices foreign to the biblical message resulted in norms and behaviors that were not coherent with what the Gospel contains.

Take, for instance, the influence wrought by an inattentive reading of the Old Testament through the negative view of the world belonging to the Neoplatonists and the Manichaeans or through the magical mentality of the pagan peoples. The most characteristic example can be taken from the Middle Ages, when ignorance among the Christian people was widespread, and forms of uncontrolled sacralization were introduced into ecclesial practice that proposed to return to the negative conception of the profane, which was characteristic of pagan cultures, or of the Jewish traditions of the Old Testament. Places of worship were conceived following the Temple of Jerusalem; the norms concerning festive rest invoked those of Hebrew

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18. Y.J.-M. CONGAR, "Situation…," cit., pp. 399–400.

19. On this topic cf. *Concilium*, 5 (1969) 7 and 9 (1973) 1, which address the issues of: "Sacralizzazione e secolarizzazione nella storia della Chiesa" and "La persistenza della religione"; S.S. ACQUAVIVA, *L'eclisse del sacro nella civiltà post–industriale* (Milan 1961); H. LUEBBE, *La secolarizzazione. Storia e analisi di un concetto* (Bologna 1970); R.L. RICHARD, *Teologia della secolarizzazione* (Brescia 1970); E. CASTELLI (Ed.), "Il sacro…," cit.; A.J. NIJK, *Secolarizzazione* (Brescia 1973); A. MILAN, "Secolarizzazione," in G. BARBAGLIO-S. DIANICH (Eds.), *Nuovo dizionario*…, cit., pp. 1438–1466; M. SODI, "Secolarizzazione," in D. SARTORE-A. TRIACCA (Eds.), *Nuovo dizionario*…, cit., pp. 1355–1370.

20. G. ROMBOLD, "Secolarizzazione," in J.B. BAUER-C. MOLARI (Eds.), *Dizionario teologico* (Assisi 1974), pp. 666–672; R. FALSINI, "Sacra è l'assemblea e non il luogo," in *Settimana del clero* 32 (1977) 25, p. 5; idem, "Asterischi," in *Rivista di pastorale liturgica* 15 (1977), pp. 54–58, especially 56–58; G. GRASSO, "Perché le Chiese?" in *Rivista liturgica* 66 (1979), pp. 553–567.

Saturday; priests were conceived as following the Levitical model of a caste totally separated from the faithful; worship was emptied by a ceremonial and ritual apparatus foreign to evangelical simplicity; the *fuga mundi* was inspired by the practice of the Essenes or by a Neoplatonic view of the world; consecrations and blessings multiplied as a result of the attempt to keep at bay the profane reality that was considered hostile.[21] At the time of the Reformation, this sacralizing mentality provoked a general rejection of the sacred.

The subject of magic requires a deeper analysis, taking into account that the sacred naturally tends toward the magical. As we have seen, the sacred is placed between the human and the divine, which must be considered as transcendental. But our knowledge of divine transcendence is partial and tends to increase or diminish due to multiple causes. The sacred keeps its just balance when divine transcendence is acknowledged to be absolute. Mankind does not always know how to keep itself at this level. When transcendence begins to be identified with the sacred we are in the realm of magic, which we can define as the intention to force the divinity, which is divested of its infinite nature, to submit to our own desires.[22]

The excesses of the sacred in magic can be innumerable as far as individual and communal behavior are concerned. Furthermore, imprudent regulations can favor among the faithful that are poorly educated a magical use of the sacraments, of liturgical celebrations, and of sacred things. This is why the need for a careful education of the faithful and a mindful control of the rites and the manifestations of popular religiosity. The reform prepared in this area by Vatican Council II by means of the Constitution *Sacrosanctum Concilium* becomes particularly relevant when taking into account the secularizing mentality of our times.

6. *The tasks of the reform Commission*

During the reform of this part III of book IV, the Commission considered the problems that radically changing the perspective of the 1917 Code would entail. According to some arguments, the doctrine on which the *Schema* was founded granted too much importance to the sacred-profane dichotomy, which many theologians did not accept.[23] The members of the *Coetus* did not take this suggestion into consideration because they

21. Y.J.-M. CONGAR, "Situation...," cit., pp. 393–395.
22. J.P. AUDET, "Le sacré...," cit., pp. 55–56; A.M. DI NOLA, "Magia," in *EdR*, III, (Florence 1971), cols. 1823–1841; V. MARCOZZI, "Magia e religione," in *La Civiltà Cattolica* 123 (1972), III, pp. 350–353; E. DE MARTINO, *Il mondo magico*, 2nd ed. (Turin 1973); no. SCHIFFERS, "Magia," in J.B. BAUER-C. MOLARI (Eds.), *Dizionario*..., cit., pp. 335–344.
23. *Comm.* 12 (1980), p. 321.

considered that it lacked a foundation, both in its doctrinal premises and in its references to the proposed *Schema* of canons.[24]

Actually, this observation could have been made not only regarding part III, but regarding the whole Code, where the term *sacred* is used with different meanings. We cannot say that the same notion of the sacred applies to orders (c. 174 § 2), rites (c. 206 § 1), pastors (cc. 212 § 1, 228 § 1, 652 § 2), disciplines (cc. 218, 248, 815), sciences (cc. 229, 279 § 2), studies (c. 279 § 1), the College of Cardinals (c. 833 § 2), worship (c. 375 § 1), visits *ad limina* (c. 395 § 2), functions (cc. 436 § 2, 561, 562), liturgy (cc. 528 § 2, 555 § 1, 619, 652 § 2, 834 § 1, 838, 1217 § 1), objects (c. 562), buildings (cc. 562, 1214), ties by which the faithful bind themselves in the institutes of consecrated life (cc. 573 § 2, 587, 603 § 2), spiritual retreats (c. 663 § 5), the magisterium (c. 750), liturgical texts (c. 767 § 1), missions (c. 770), pious practices of the Christian people (c. 839 § 2), holy oils (c. 847), the Eucharist (c. 914), sacred vestments (c. 929), the sacrament of confirmation (c. 1033), sacramentals (c. 1166), sacred objects set aside for divine worship (c. 1171), images of the saints (c. 1188), relics (c. 1190 § 1), places and times (the title of this part of book IV), art (c. 1216), goods (cc. 1220, 1375), celebrations (cc. 1225, 1228, 1235 § 2, 1365), apostolate (c. 1254 § 2), dedicated or blessed objects (cc. 1269, 1376).

Had the Commission accepted the suggestion, it would have had to deal with a very complex problem for which they probably did not feel competent. We should not forget that Vatican Council II itself used the term *sacred* often in its own documents, when referring to places (*SC* 123/227, 124/229, 128/237) and to times (*SC* 107/192, *OE* 21/482).[25] It is considered substantially appropriate not to deviate from the *CIC*/1917 (this is not changing the notion of sacred place and the scheme of treatment) and to simplify as much as possible the canons to adapt them to a contemporary mentality.

In the situation that we have described, the limitations of the Code can only be overcome at the level of interpretation, taking, whenever this is possible, the criterion indicated by John Paul II in the Apostolic Constitution *Sacrae disciplinae leges* as a point of reference.[26] It would be interesting, in any case, to carry out an analysis that aimed to determine the different meanings that the legislator assigns to the term *sacred* in the Code.

24. Ibid., 322.
25. PH. DELAYE-M. GUERET -P. TOMBEUR, *Concilium Vaticanum II. Concordance, index, listes de fréquence, tables comparatives* (Louvain 1974), pp. 575–578.
26. Cf. A. LONGHITANO, "Chiesa, diritto e legge nella costituzione apostolica 'Sacrae Disciplinae *LE*'," in *Monitor Ecclesiasticus* 108 (1983), pp. 399–435.

TITULUS I
De locis sacris

TITLE I
Sacred Places

INTRODUCTION

José Antonio Abad

In accordance with its title, cc. 1204–1243 deal with sacred places, or, to be more precise, with the *principal* sacred places of the Church. The canons of this title refer explicitly to churches, oratories, private chapels, sanctuaries, and cemeteries. One sacred place that is very important from a theological and historical point of view, however, is not mentioned: the baptistry; this may be due to the fact that the baptistry tends to be inside the church.

Sacred places are analyzed according to a very logical scheme that is, in most cases, substantially the same. First, there are canons of a general character regarding: the nature of sacred places (c. 1205), the minister who blesses or dedicates them (cc. 1206–1207), their violation (c. 1211), the loss of their sacred character (c. 1212), and the proper authority to act in them (c. 1213) Then we find the regulation of the specific sacred places, following this order: churches (cc. 1214–1222), oratories and private chapels (cc. 1223–1229), sanctuaries (cc. 1230–1234), cemeteries (cc. 1240–1243), and the subsection about altars (cc. 1235–1239).

The order of presentation followed is in accordance with the nature of these matters:churches are first, in as much as they are places set aside for the entire Christian community, and, for this reason, all acts of worship are performed in them;oratories and chapels are second because they are allocated to certain groups of people in which only some acts of worship are performed;sanctuaries are third, where some or many communities and persons gather in order to pray or to do penance in specific circumstances and at specific moments in their lives; and, finally, cemeteries. Perhaps cemeteries could have been dealt with after churches, since these are the two most important sacred places for the Christian community; but it is possible that the legislator may have preferred to distinguish two groups, dealing in the first one with the places associated with the living (churches and similar places) and then with cemeteries following the biological order of human and Christian existence. This is a respectable

order, then. On the other hand, it does not seem to be appropriate to introduce here a specific chapter about altars, and to place it right before dealing with all the specific sacred places since the altar is a part of churches, oratories and chapels, even cemeteries, where there are normally oratories as well. If the legislator had intended to deal with altars when talking about sacred places, he should have done it either at the end or immediately after churches, since this is their principal element.

Generally speaking, the scheme of the *CIC*/1917 is followed here, but there are some important variations. While the pio-benedictine Code talked about churches, oratories, and cemeteries, and in referring to oratories distinguished between public, semi-public, and private, the current Code talks about churches, oratories, and private chapels; furthermore, it also talks about sanctuaries. On the other hand, the functions of each place are better specified, thus simplifying the regulation.

1. *Churches*

Certainly, tradition is unanimous regarding the importance and priority of churches over all other sacred places, because from the *domus ecclesiae* to the most modern parishes, including basilicas, cathedrals, collegiate churches, etc., in the most diverse locations and cultures, there have always existed buildings assigned to the religious service of *all the faithful.* This is what the Code calls churches. They are, in fact, sacred buildings assigned to divine worship to which "all the faithful have right of access for the exercise, most of all, of divine worship" (c. 1214). Their nature entails the *obligation* to dedicate or bless them according to the liturgical prescriptions (c. 1217) that are provided for in the corresponding rite.[1]

2. Oratories

Besides these buildings, there existed from the most remote antiquity (although there is no written evidence until the fourth or fifth centuries) other places called *oratories*, built exclusively for the private use of a family or of a restricted number of physical or moral persons. The testimonies of St. Gregory Nanziensis, St. Gregory the Great, and St. Gregory of Tours are quite well known; they refer to the oratory that formed part of their episcopal residence. But such chapels existed also in hospitals

1. *Pontificale Romanum ex decreto sacrosancti oecumenici concilii Vaticani II instauratum, auctoritate Pauli Pp. VI promulgatum. Ordo dedicationis ecclesiae* (Editio typica, TPV 1977). This *Ritual* is concerned with: *a*) the dedication of a church and *b*) the blessing of a church. Also included are the dedication and blessing of an altar, as well as the ritual Mass said on the day a church or an altar is dedicated. The following references to the *Ceremoniale Episcoporum* which complete this list concern: *a*) dedication of a church (pp. 211ff); *b*) dedication of an altar (pp. 213ff); *c*) blessing of a church (pp. 221ff), *d*) blessing of an altar (pp. 225ff), *e*) blessing of the first stone or beginning of the work on the church (pp. 293ff) and *f*) blessing of the bells (pp. 235ff).

and even in the houses of patricians, both in the East and the West. This situation easily resulted in abuses, which is why some councils (i.e., that of Laodicea in the year 320, and that of Carthage in 390) forbade the celebration of Masses in private houses without the prior consent of the bishop. St. Augustine recommended that oratories only be used for the end for which they were created, in other words, to pray. Somewhat later, *Narrative 38* of Justinian shared these opinions wholeheartedly and issued a rebuke against the excessive frequency with which liturgical meetings were held in oratories, arguing that they were only licit if they were prayer meetings. Oratories, conceived for the satisfaction of individual piety, remained throughout the different periods of the history of the Church. Good examples include the primitive monastic communities, male and female, the feudal chapels of the Middle Ages, and those in the noble palaces of more recent times.

But, when evangelization was extended to rural areas, oratories assumed the public character of a subsidiary church in the service of a more or less numerous group of the faithful who lived in isolation and far from the city and the episcopal church. The big landowners of the sixth and seventh centuries did not forget to build next to their houses these kinds of oratories, so that they could easily attract stable workers to their estates. It is precisely in this kind of center of civil and religious life that most of the old neighborhoods and parish churches appear. The liturgical life of these oratories was very limited and intimately dependent on the principal church, since the faithful had to attend it (sometimes under the penalty of excommunication) on the important festivals of the liturgical year; the majority of medieval synods concerned themselves with vigilance over this liturgical discipline, contributing thereby to the preservation of the purity of the faith and to unity.

The golden age of oratories began in the twelfth century with the revival of the old corporations and guilds under new forms. Professionals, merchants, and workers created associations to defend their interests, but enlightened by and under the impulse of faith. This explains why they put themselves under the protection of a saint, and why they built oratories in the saint's honor, where they would gather periodically to both discuss their problems, pray together, and offer suffrages for their dead. When corporativism spread all over Europe, the number of oratories increased greatly, and they were often spacious and rich, becoming the true heart of innumerable companies in Italy and of the confraternities of the French.

During the fifteenth and sixteenth centuries, the gradual decadence of the oratory began, but the *confraternities*, which were normally of a religious nature (they were the representatives of the professional associations even though they originated in the mystical movements of the flagellants and penitents, most of all in Italy), often built a church and established their headquarters in a chapel. Even more frequently, however, they built an oratory of their own, in which the members met for their

particular functions, to pray the office of the Virgin and the office for the deceased.

In the legislation of the pio-benedictine Code (c. 1188), which distinguished three types of oratories (public, semi-public, and private) this long tradition was present. In fact, that Code argued that oratories were places of worship but that they were not assigned to the public worship of all the faithful people, but to a college or group of people—even though the whole of the faithful people had a nominal right to access it (public)—or to a community or group of the faithful while access was denied to others (semi-public), or built in a private house for the use of a family or person (private).

The *CIC* talks only about *oratories* and *private chapels*. The oratories were built for the benefit of a community or a group of faithful (c. 1223). The rest of the faithful can have access to them when the proper superior allows it, and all sacred celebrations can be performed in them except those forbidden by law, by the local ordinary, and by the liturgical norms (c. 1225). Private chapels, on the other hand, are built for the benefit of one or several physical persons with the authorization of the local ordinary (c. 1226). Both are reserved *exclusively* for divine worship (c. 1229) and, although it is appropriate, *it is not necessary* that they be blessed (c. 1229). If they are blessed, this must be done following the rite prescribed in the *Rite of Dedication of Churches and Altars.*[2]

3. Cemeteries

Together with churches, cemeteries are the main sacred places for the faithful. Certainly, Christians are not always buried in a sacred place, but this practice did not take long to become a reality.

Indeed, when Christianity made its entrance into history, it found a peculiar pagan tradition: citizens could decide to be buried either apart from or in the company of people chosen by them. This practice led to *gentilia*, or family tombs and *columbaria*, or collegial tombs. Family tombs were built in a garden outside the walls of the house. These tombs were the origin of Christian cemeteries because Roman patricians, although they followed the common funerary customs, broke out of the circle of their blood relatives or friends by admitting into their burial sites their brothers and sisters in the faith. This explains why the oldest catacombs are not named after a martyr but after the owner to whose family the tomb belonged. This also explains the need to expand the burial site by going underground, since it soon became incapable of accepting the growing number of deceased. This is how the multilevel catacombs or subterranean excavations came about.

2. *Pontificale Romanum*..., cit.

Before the third century, however, cemeteries ceased being private property and instead became the property of the Church. In the fourth century, another important change took place, because the subsoil of the new basilicas became the place for the burial of the martyrs, and alongside their sepulchers, of other Christians. The new practice became consolidated so rapidly that at the end of the fourth century, Roman basilicas on the outskirts of town were full of sepulchers.

This new custom, however, was soon opposed both in the East and in the West, to such an extent that one of Charlemagne's capitulars specifically forbade burials inside churches. All things considered, this prohibition was gradually tempered, and the council of Mainz (a. 813) permitted bishops, abbots, presbyters, and qualified lay people to be buried inside the church. This legislation entered the Decree of Gratianus.

During the time of the invasions, the hierarchy preserved as much as possible the separation between Christians and pagans, creating sacred places around the church, where the faithful were buried. The custom of having cemeteries close to the church was consolidated during the Middle Ages. They were considered as an extension of the church and as a practical means to promote the fraternization between the faithful and the deceased.

The pio-benedictine Code sanctioned the practice of burying the faithful in sacred places (c. 1205 § 1) outside of churches (c. 1205 § 2), unless the deceased were diocesan bishops, abbots or prelates *nullius*—who had to receive burial in their own churches—or in the case of the Roman Pontiff, members of royalty, or cardinals (c. 1205 § 2). Furthermore, it provided that each parish should have its own cemetery (c. 1208). It also provided for the existence of a non-sacred place to bury those to whom ecclesiastical burial was denied (c. 1212).

The *CIC* is more flexible when it comes to this matter, due to the changes that have taken place in civil society and the more diverse circumstances in which Christians find themselves. This explains why, although the desire of the legislators was that "each have their own cemetery" (c. 1240 § 1), the Code actually provides that there can be a sacred space inside civil cemeteries (1240 § 1), or even when "this is not possible" (c. 1240 § 2), it would be satisfactory to bless the space of each grave. The blessing of the cemetery is performed according to the rite described in the *Caeremoniale Episcoporum*[3] and that of the grave according to the *Ritual de exequias.*[4]

3. Cap. XIX *De Benedictionis coemeterii*, nos. 1054–1064 gives some doctrinal guidelines and the rites for blessing both for an exclusively Catholic cemetery and for one shared by various Christian confessions.

4. *Rituale Romanum ex decreto oecumenici concilii Vaticani II instauratum, auctoritate Pauli Pp. VI promulgatum* (Editio Typica, TPV 1969). We make reference to the 2nd Spanish ed. of the *Ritual de exequias* (Madrid 1979), which describes in detail each one of the possible cases.

On the other hand, the current Code preserves the practice of *CIC*/1917 of not burying corpses in churches, and limiting the exceptions to the Roman Pontiff, the cardinals, and diocesan bishops, although in the last case it increases the concession because it extends it to the emeritus bishops (c. 1242). The *Caeremoniale Episcoporum* highly recommends that a bishop be the one who performs the funeral rites of another bishop (no. 821) and describes the way in which the celebration should be carried out (nos. 821–839).

1205 **Loca sacra ea sunt quae divino cultui fideliumve sepulturae deputantur dedicatione vel benedictione, quam liturgici libri ad hoc praescribunt.**

Sacred places are those which are assigned to divine worship or to the burial of the faithful by the dedication or blessing which the liturgical books prescribe for this purpose.

SOURCES: c. 1154; GIRM 255, 265; RDCA ch. II, 6; ch. IV, 12; ch. V, 1 et 2; ch. VI, 1

CROSS REFERENCES: cc. 834, 1171, 1217, 1229, 1237, 1240

COMMENTARY

Adolfo Longhitano

The legislator, ignoring the general principle that definitions should be avoided in law, had already provided the definition of the canonical notion of *sacred place* in the *CIC*/1917.[1] The *CIC* adopts it again in c. 1205 but includes some important alterations with the intention of avoiding the multiplication of dangerous ambiguities already present in the very notion of the sacred itself (see introduction to part III of *Liber* IV).[2]

Since the legislator uses the adjective *sacred* frequently in the *CIC*, it is necessary to differentiate the sacred nature specific to sacred places from the generic one that corresponds to so many other realities of ecclesial life.

The sacred character of a place derives from exactly two conditions: its assignation either to divine worship or to the burial of the faithful (final cause) and its dedication or blessing (efficient cause). For a place to be considered sacred, it is necessary from a juridical point of view that both of these conditions are met simultaneously. One could find cases in which

1. Of the numerous commentaries on the canons regarding sacred places in the *CIC*/1917 cf. in particular: F.M. CAPPELLO, *Summa iuris canonici*, II (Rome 1962), pp. 433–537; R. NAZ, "Lieux sacrés," in *Dictionnaire de Droit canonique*, VI (Paris 1957), col. 528–53; A. ALONSO MORÁN, "De los lugares y tiempos sagrados," in A. ALONSO LOBO-L. MIGUÉLEZ DOMÍNGUEZ-S. ALONSO MORÁN (Eds.), *Comentarios al Código de Derecho canónico*, II (Madrid 1953), pp. 745–843.

2. For commentary on the introductory canons (cc. 1205–1213) regarding sacred places, cf. *Salamanca Com*; *Pamplona Com*; V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985), pp. 695–697; T. RINCÓN, "Disciplina canónica del culto divino," in *Manual de Derecho canónico*, 2nd ed. (Pamplona 1991), pp. 591–596; G. GHIRLANDA, *Il Diritto nella Chiesa mistero di comunione. Compendio di Diritto ecclesiale* (Rome 1990), pp. 391–393; A. GIACOBBI-A. MONTAN, "Luoghi e tempi sacri," in *Il Diritto nel mistero della Chiesa*, III, 2nd ed., (Rome 1992), pp. 317–345.

a place may have been steadily assigned to worship but has not been dedicated or consecrated, but not the contrary.

Although the Rite of Dedication of a Church and an Altar , reclaiming the most ancient Christian tradition, affirms that "the Eucharist ... consecrates the altar and the place of the celebration in all cases,"[3] this sacred character cannot have juridical relevance. That would require the minimum degree of certainty (cc. 1208–1209) and of informing the proper ecclesiastical authorities (cc. 1206–1207), which is guaranteed by the formal dedication or blessing.[4]

It is necessary to explain briefly the following two requirements:

1. *Assignation of places for worship or burial*

The kind of worship to which the *CIC* refers does not have the broad meaning that encompasses the entire life of the Christian in a perennial act of adoration and gratitude to God, but it refers to the liturgical celebrations of the paschal mystery, of the sacraments, and of prayer, as it is configured in c. 834.[5] Consequently, it is not difficult to establish a typology for the places assigned to worship.

The *CIC*, in this title I of part III, concerns itself just with churches and altars; but liturgical law also includes the baptistry, the pulpit, the tabernacle, and the place where the sacrament of penance is celebrated, for which a specific rite of consecration or blessing is provided, although we could initially believe that we are dealing with the necessary or natural components of a sacred building.[6]

The place assigned to burial can be considered individually (the grave) or as a group (the cemetery).[7] The cemetery is also a place of celebration, because in it the Church accompanies with its prayers the final burial of the faithful who has reached the end of his or her exodus.[8]

3. RDCA , *Praenotanda*, II, 17.

4. Cf. J.T. MARTÍN DE AGAR, commentary on cc. 1206–1209, in *Pamplona Com*; V. PINTO (Ed.), *Commento*..., cit., p. 695.

5. Cf. S. MARSILI, "La liturgia, momento storico della salvezza," in *Anàmnesis. I. La liturgia momento nella storia della salvezza*, 2nd ed. (Casale Monferrato 1979), pp. 32–179; 107–136; A. BERGAMINI, "Culto," in D. SARTORE-A. TRIACCA (Eds.), *Nuovo dizionario di liturgia* (Rome 1984), pp. 333–340.

6. Cf. *Ordo benedictionum Ritualis Romani* (Vatican City 1985), pp. 322–356; P. JOUNEL, "Luoghi della celebrazione," in D. SARTORE-A. TRIACCA (Eds.), *Nuovo dizionario*..., cit., pp. 783–799; A.G. MARTIMORT, *La Chiesa in preghiera. I. Principi della liturgia*, 2nd ed. (Brescia 1987), p. 235; L. CHENGALIKAVIL, "La dedicazione della chiesa e dell'altare," in *Anàmnesis*, VII (Genoa 1989), pp. 65–109.

7. Cf. F.L. FERRARIS, "Coemeterium," in *Prompta bibliotheca canonica, juridica, moralis, theologica*, II (Paris 1858), cols. 698–702; R. NAZ, "Cimetière," in *Dictionnaire de Droit canonique*, III (Paris 1942), cols. 730–742; G. OLIVERO, "Cimitero (Diritto canonico)," in *Enciclopedia del Diritto*, VI (Milan 1960), pp. 998-999.

8. Cf. P. JOUNEL, "Luoghi...," cit., p. 788.

In the early centuries, the most cherished desire for Christians was to repose *ad sanctos*, in other words, in the same place where the martyrs had been buried, or, at least, inside the church or in a neighboring area. The cemetery, even though it has been moved out of the city limits, continues to be a sacred place that welcomes all the deceased regardless of their religion and is no longer under ecclesiastical jurisdiction. Respect for the body of the deceased has led the Church to formulate a solemn blessing for the moment of inauguration of cemeteries, with which the divine grace is invoked for those who will be buried while awaiting the final resurrection.[9]

2. *Dedication or blessing*

Far more complex is the topic of the dedication or blessing (the *CIC*/1917 read "consecratione vel benedictione"). This variation, which was made to adapt the legislative text to the liturgical books (the *Ordo* had already been promulgated in 1977) provoked a certain amount of perplexity in the consultative see; some wanted to write "dedicatione seu consecratione vel benedictione" to prevent the term "consecratio" from disappearing from the *CIC*, but all the consultors agreed to reject the proposal, not only because doubling the terminology would have resulted in misunderstandings, but also because from a theological point of view the term *dedicatio* seemed more appropriate.[10] And it is precisely the theological meaning assigned to *dedication* in the liturgical books that forces us to explain the expression *sacred places* used by the legislator in a different way; this is not an objective sacred character, but rather symbolic, proper to the signs.

a) *Dedication*

The binomial *dedication-consecration* had been borrowed from classical antiquity. For the Romans, the *dedicatio* was the official, public act with which the divinity was granted ownership over an estate or a house; *consecratio* was, on the other hand, the religious fact that concluded the juridical act. Until the eighth century, the Roman liturgy recognized the eucharistic celebration as the only specific element in the dedication of a church or altar to God, but other liturgies had already begun to derive from the Old Testament solemn and splendid forms and ritual expressions that evoked the dedication of Solomon's temple (1 Kings 8).[11]

9. Cf. *Ordo benedictionum*..., cit., pp. 425–432; *Caeremoniale Episcoporum* (Typis polyglottis Vaticanis 1984), pp. 243–246.
10. Cf. *Comm.* 12 (1980), p. 325.
11. Cf. R. FALSINI, "Dalla Chiesa-comunità alla chiesa-luogo," in *Rivista di pastorale liturgica*, 16 (1978) 88, pp. 53–62; S. MARSILI, "Dedicazione senza consacrazione. Ossia: una Teologia liturgica in una storia rituale," in *Rivista liturgica* 66 (1979), pp. 578–601.

This tendency ended up obscuring the symbolic and functional meaning of the sacred building, returning the Church to a conception that the New Testament had already overcome. In the economy of salvation, the temple of Jerusalem was a sign of the Body of Christ, destined to pass away when the Son of God, by becoming human and offering himself as a expiatory victim for our sins, became the temple itself, victim and priest of the New Covenant (Heb 8–10).[12] The church built with stones would no longer have to have the meaning of "dwelling place of God," nor would it have to have the sacred character proper to the temple of Jerusalem. It would be a building designed only for the community's worship and to evoke the Church made with "living stones" (1 Pt 2:5).[13]

The *Ordo dedicationis*, promulgated in 1977 to put in practice the reform foreseen by Vatican Council II, consciously rejects the term *consecration* to avoid any form of sacralization of objects, and only retains the term *dedication* to indicate the rite with which the place designated for the meetings of the Christian community becomes a sign of the Church-temple of God, built with living stones.[14] This is consequently not a rite that determines the "'objective consecration' of a building so that its walls are the depository, and, consequently, the bearers of a 'sacredness,' that can in any way be communicated to everything that is done and to everyone that meets inside the building."[15]

b) *Blessing*

In biblical parlance, the term *blessing* indicates not only the prayer of praise or thanks that human beings offer to God for goods received, but also God's action that shows the favor itself, that bestows a special protection (descending blessing).[16]

From the theological point of view, blessings (and consecrations) are sacramentals; it is necessary to consider them as the extension and

12. Cf. Y. CONGAR, *Il mistero del Tempio* (Turin 1963), pp. 135–176.

13. Cf. E. CATTANEO, "Tempio pagano, ebraico, cristiano," in *Il tempio. Atti della XVIII settimana liturgica nazionale a Monreale (28 agosto–1 settembre 1967)* (Rome 1968), pp. 19–37; S. MARSILI, *Dal tempio locale al tempio spirituale*, ibid., pp. 51–63.

14. Cf. J. EVANOU, "Le nouveau rituel de la dédicace," in *La Maison-Dieu*, 134 (1978), pp. 85–105; I. CALABUIG , "Un 'rito' per una Chiesa che vive," in *Rivista di pastorale liturgica* 16 (1978), pp. 41–51; S. MARSILI, "Dedicazione...," cit; L. CHENGALIKAVIL, *La dedicazione...*, cit., pp. 85–100; P. JOUNEL, "Dedicazione delle chiese e degli altari," in D. SARTORE-A. TRIACCA (Eds.), *Nuovo dizionario...*, cit., pp. 352–367.

15. S. MARSILI, "Dedicazione...," cit., p. 595.

16. On this issue cf. H.W. BEYER, "Eulogéo," in G. KITTEL-G. FRIEDRICH, *Grande lessico del Nuovo Testamento*, III (Brescia 1967), cols. 1149–1180; A.M. DI NOLA-L. DELLA TORRE, "Benedizione e maledizione," in *Enciclopedia delle religioni*, I (Florence 1970), cols. 1002–1008; M. SODI, "Benedizione," in D. SARTORE-A. TRIACCA (Eds.), *Nuovo dizionario...*, cit., pp. 157–175; cf. no. 175 (1988) of *La Maison-Dieu* which develops the theme: "Bénir Dieu en tout temps."

development of the sacredness of the Church.[17] The *Ordo benedictionum ritualis romani* defines blessings as "sensible signs, by means of which the sanctification of the faithful in Christ and the glorification of God, which is the end towards which all the other acts of the Church aim, is expressed and performed in a proper manner."[18]

The person or thing blessed can acquire a kind of permanent sacred character (constitutive blessings). Alternatively, a physical or spiritual good can be requested for their benefit (inchoative blessings), the effect of which depends on the disposition of the subject and the prayer of the Church.

Constitutive blessings, with the permanent sacred character that they bestow, remove the person or object from common use (consecration or blessing of virgins, blessing of places or of sacred vessels for worship, etc.). Inchoative blessings, however, do not change the nature or the finality of the people or things blessed (blessed bread is eaten, blessed people continue to live their own lives, etc.).

It becomes obvious that there is a certain similarity between the dedication-consecration and the constitutive blessing. Dedication (if we are dealing with a sacred place) and consecration (if we are dealing with people) are more specific, whereas a constitutive blessing is more generic. In any case, these rites confer a sacred characeter upon a person or a thing to reserve them for God or for worship. The *Ordo* makes this distinction in determining whether to use a dedication or a blessing: the first would affect "sacred buildings or churches permanently assigned to the celebration of the divine mysteries"; the second one would refer to "private oratories, chapels or sacred buildings that, for specific reasons, are assigned to worship only temporarily."[19]

17. Cf. A. DONGHI, "Sacramentali," in D. SARTORE-A. TRIACCA (eds.), *Nuovo dizionario...*, cit., pp. 1253–1270; *Anàmnesis. VII. I sacramentali e le benedizioni* (Genoa 1989), G. KOCH, "Sacramentali," in W. BEINERT (Ed.), *Lessico di teologia sistematica* (Brescia 1990), pp. 591–592.

18. *Ordo benedictionum...*, cit., *Praenotanda*, 9. This introduction can also be found in *EV*, IX, pp. 802–827.

19. RDCA , *Praenotanda*, ch. 5, no. 1.

1206 **Dedicatio alicuius loci spectat ad Episcopum dioecesanum et ad eos qui ipsi iure aequiparantur; iidem possunt cuilibet Episcopo vel, in casibus exceptionalibus, presbytero munus committere dedicationem peragendi in suo territorio.**

The dedication of a place belongs to the diocesan Bishop and to those equivalent to him in law. For a dedication in their own territory they can depute any Bishop or, in exceptional cases, a priest.

SOURCES: cc. 1155, 1157; CodCom Resp. I, 29 ian. 1931 (*AAS* 23 [1931] 110); RDCA ch. II, 6; ch. IV, 12

CROSS REFERENCES: cc. 131, 381 § 2, 1169

COMMENTARY

Adolfo Longhitano

The present canon, assuming and modifying some of the norms of the *CIC*/1917 (cc. 1155 and 1157), defines the subject upon whom the dedication of a place is incumbent. References to members of religious orders and cardinals have been eliminated because they are considered superfluous.[1] The proper subject to celebrate the dedication is no longer the local ordinary, but the diocesan bishop, and those that are ranked equal to him by law. This is why we do not need to refer to c. 134,[2] but to c. 381 § 2 in order to recognize the individuals authorized to dedicate a place: the territorial prelate and abbot, the vicar, the apostolic prefect and administrator (c. 368).

Furthermore, these individuals, even when they do not have an episcopal character, can personally celebrate, or, within their territory, entrust a bishop with this task, and in exceptional cases, entrust a mere presbyter. The expression "*munus committere*" used by the *CIC* is equal to a delegation because it is a faculty that is by law the responsibility of the bishop and other individuals equivalent in law to the bishops, but that can be delegated to others within the limits established by this canon.

In the absence of specific indications in the *CIC* or in the liturgical documents, the exceptional nature of the case is left to the consideration

1. Cf. *Comm.* 12 (1980), pp. 325–326.
2. Cf. J.T. MARTÍN DE AGAR commentary on c. 1206, in *Pamplona Com*; V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985), p. 695.

of the delegating person. These are innovations introduced by the Rite of Dedication of a Church and an Altar, which the *CIC* has incorporated.[3] The norm is assumed without variations by the *Caeremoniale Episcoporum.*[4]

One should take into account that c. 1169 § 1 only considers valid those consecrations and dedications performed by bishops and presbyters "who are permitted to do so by law or by legitimate grant."

3. RDCA , III, 6; IV, 12; *Comm.* 12 (1980), p. 326.
4. Cf. *Caeremoniale Episcoporum* (Typis polyglottis Vaticanis 1985), no. 867, p. 199.

1207 Loca sacra benedicuntur ab Ordinario; benedictio tamen ecclesiarum reservatur Episcopo dioecesano; uterque vero potest alium sacerdotem ad hoc delegare.

Sacred places are blessed by the Ordinary, but the blessing of churches is reserved to the diocesan Bishop. Both may, however, delegate another priest for the purpose.

SOURCES: cc. 1156, 1157, 1163; CodCom Resp. I, 29 ian. 1931 (*AAS* 23 [1931] 110); RDCA ch. V, 2; ch. VI, 4

CROSS REFERENCES: cc. 131, 134 § 1, 1169, 1214

COMMENTARY

Adolfo Longhitano

The principle established by this canon is very linear, especially when we take into account the formulation of cc. 1156–1157 and 1163 of the *CIC*/1917.

The subject responsible for the blessing of a place is normally the ordinary, in the sense defined by c. 134 § 1, in other words: the Roman Pontiff, the diocesan bishops, and those of the same rank that, even temporarily, are in charge of a particular church or community (c. 368); those individuals who enjoy general ordinary executive power of governance (vicars general and episcopal vicars); and also, for the proper members, the major superiors of the clerical religious institutes of pontifical right and of the clerical societies of apostolic life of pontifical right who have at least ordinary executive power of governance.

This is a general principle that refers to the blessing of all sacred places with the exception of churches, which are reserved to the diocesan bishop. By church we understand "a sacred building intended for divine worship, to which the faithful have right of access for the exercise, especially the public exercise, of divine worship" (c. 1214). This exception, accordingly, does not refer to oratories, private chapels (c. 1223), and other sacred places foreseen by the liturgical books.

Both the ordinary and the bishop can delegate the celebration of the blessing to another priest.[1] It does not seem to us, from a juridical

1. Cf. RDCA, V, 2; *Caeremoniale Episcoporum* (Typis polyglottis Vaticanis 1985), no. 956, p. 221.

perspective, that there is a fundamental difference between the "*munus committere*" of c. 1206 and the "*delegare*" of this canon. In both cases, there is an exercise of a delegated faculty. All things considered, however, in the case of the dedication, the delegation is exceptional in character, whereas, in the case of the blessing, it has an ordinary character.

1208 **De peracta dedicatione vel benedictione ecclesiae, itemque de benedictione coemeterii redigatur documentum, cuius alterum exemplar in curia dioecesana, alterum in ecclesiae archivo servetur.**

A document is to be drawn up to record the dedication or blessing of a church, or the blessing of a cemetery. One copy is to be kept in the diocesan curia, the other in the archive of the church.

SOURCES: c. 1158; RDCA ch. II, 25

CROSS REFERENCES: cc. 486 § 2, 491 § 1, 1209, 1218, 1237

COMMENTARY

Adolfo Longhitano

The norm provided by the corresponding c. 1158 of the *CIC*/1917 was much broader, because it referred to the consecration and to the blessing of all sacred places. The reason for that norm was the importance granted by the legislator to the consecration-blessing of a place reserved for divine worship or for the burial of the faithful.

In the new *CIC*, the prescription to make a record of the dedication-blessing performed, and to keep a copy in the archive of the diocesan curia and another in the archive of the church (or one of the institutions responsible for the sacred place), has been reduced and only affects the dedication-blessing of churches and cemeteries. This change, on the one hand, simplifies a norm that was generally neglected, and, on the other hand, reinforces the importance that the liturgical rite assumes for the constitution of a sacred place and for the juridical consequences that derive from it (cc. 1210–1211).

The record should include the date of the dedication-blessing, the name of the bishop who has performed the rite, the title of the church (c. 1218) or cemetery, and the name of the saint whose relics have been deposited in the altar (c. 1237 § 2). It should also be signed by the bishop, the rector of the church, and some individuals among the faithful on behalf of the local community.[1]

1. RDCA , II, 25; *Caeremoniale Episcoporum* (Typis polyglottis Vaticanis 1985), no. 877, p. 202; no. 1056, p. 243.

1209 **Dedicatio vel benedictio alicuius loci, modo nemini damnum fiat, satis probatur etiam per unum testem omni exceptione maiorem.**

The dedication or the blessing of a place is sufficiently established even by a single unexceptionable witness, provided no one is harmed thereby.

SOURCES: c. 1159 § 1

CROSS REFERENCES: cc. 876, 955 § 1, 1573

COMMENTARY

Adolfo Longhitano

This norm has as a premise the juridical relevance that a place assumes once it is dedicated or blessed. In case no document can be found of the rite that has constituted the sacred place, it is necessary to resort to proof *per testes*. According to the *regulae iuris*, at least two witnesses were necessary for the proof to be considered valid;[1] but the *CIC* does not exclude, provided that certain conditions are met, the possibility that the testimony of a single witness can totally certify it (cc. 876, 1573). As proof that the dedication-blessing was performed, the testimony of a single person is acceptable, provided that the fact does not cause damage to anyone and that the individual is above any suspicion.

Damage to others can occur when a place, on being definitively reserved for worship or the burial of the faithful, is subject to the vigilance of the ecclesiastical authority and cannot be used for any other purpose The owners at the time, however, could oppose this because they did not want intrusions by strangers or because they intended to use the place for "profane" purposes.

A witness is considered above suspicion when, due to personal qualities or knowledge of the facts, the person is shown to be more serious and trustworthy than the average individual.[2]

1. Cf. Ulp. 1. 12 D. *de test.* 22,5.
2. Cf. C. HOLBOCK, *Tractatus de iurisprudentia Sacrae Romanae Rotae* (Graz 1957), p. 329; T. GIUSSANI, *Discrezionalità del giudice nella valutazione delle prove* (Vatican City 1977), pp. 174–180.

1210 **In loco sacro ea tantum admittantur quae cultui, pietati, religioni exercendis vel promovendis inserviunt, ac vetatur quidquid a loci sanctitate absonum sit. Ordinarius vero per modum actus alios usus, sanctitati tamen loci non contrarios, permittere potest.**

In a sacred place only those things are to be permitted which serve to exercise or promote worship, piety and religion. Anything which is discordant with the holiness of the place is forbidden. The Ordinary may however, for individual cases, permit other uses, provided they are not contrary to the sacred character of the place.

SOURCES: cc. 1164 § 2, 1165 § 2, 1171, 1178; *MD* III; SCHO Instr. *Sacrae artis*, 30 iun. 1952 (*AAS* 44 [1952] 542–546); SCRit Instr. *De musica sacra*, 3 sep. 1958, 55 (*AAS* 50 [1958] 648); *SC* 124–128; *SCDW* Instr. *Liturgicae instaurationes*, 5 sep. 1970, 10 (*AAS* 62 [1970] 694); GIRM 254

CROSS REFERENCES: cc. 562, 1171, 1219, 1220, 1239, 1243

COMMENTARY

Adolfo Longhitano

This canon is a new formulation, but there were already many references in c. 1178 of the *CIC*/1917 forbidding in churches anything foreign to the sanctity of the place, such as markets, fairs (even those that were held with a pious end in mind), theater shows, banquets, etc.[1] Since the norm has been included in these introductory canons about sacred places, it cannot refer only to churches.

The topic with which the canon deals presents some problems because it is not easy to establish valid criteria to distinguish between what is useful to promote worship, piety, and religion from what is alien to the sanctity of the place. Although we could agree on considering some behaviors appropriate or inappropriate and constituting thereby negative and positive extremes, there would yet remain a field of debatable behaviors in between for and against which very different arguments could be presented according to how the sacred character of the place is conceived.

1. Cf. A. ALONSO-L. MIGUÉLEZ-S. ALONSO (Eds.), *Comentarios al Código de Derecho canónico*, II (Madrid 1953), pp. 767–768.

When the sacred entails a rigid separation from reality, everything but the act of worship is considered inappropriate. When, on the other hand, the sacred is believed to belong to the realm of signs, which continue to be part of the human even though they are used to invoke and make present the divine in history, the realities that can be considered useful for the exercise of the promotion of worship, piety, and religion are many. An example would be a meeting to deal with the problems of a neighborhood (not to convoke political assemblies), to debate topics of cultural or current import, or for other initiatives related to the promotion of Christianity in a society.

This explains the proposals to prepare buildings of worship for "multiple uses," which would allow the Christian community to feel deeply involved in human affairs.[2] The same Revision Commission, when formulating the text for this canon, took into account that the expression "quae cultui, pietati, religioni exercendis vel promovendis inserviunt" encompasses all that is related to the advancement of human beings in a Christian sense.[3]

The norm leaves some room for the intervention of the ordinary, who can evaluate the appropriateness of granting authorizations "*per modum actus*." It would be preferable to organize by means of diocesan norms a subject that cannot be regulated by means of general considerations that are valid for all places and all times.[4]

The problem has been partly addressed by the document published by the Congregation for Divine Worship, December 6, 1987, regarding *Concerts in Churches*. This document provides practical guidelines for the organization of concerts in churches when no liturgical celebration is taking place.[5]

2. Cf. G. GRASSO, "Perché le Chiese?" in *Rivista liturgica* 66 (1979), pp. 553–567.
3. Cf. *Comm.* 12 (1980), p. 331.
4. Cf. ibid., p. 329.
5. Cf. *EV*, X (Bologna 1989), pp. 1534–1541.

1211 Loca sacra violantur per actiones graviter iniuriosas cum scandalo fidelium ibi positas, quae, de iudicio Ordinarii loci, ita graves et sanctitati loci contrariae sunt ut non liceat in eis cultum exercere, donec ritu paenitentiali ad normam librorum liturgicorum iniuria reparetur.

Sacred places are violated by acts done in them which are gravely injurious and give scandal to the faithful when, in the judgement of the local Ordinary, these acts are so serious and so contrary to the holiness of the place that worship may not be held there until the harm is repaired by means of the penitential rite which is prescribed in the liturgical books.

SOURCES: cc. 1172–1177

CROSS REFERENCES: cc. 134 § 2, 834, 1205, 1376

COMMENTARY

Adolfo Longhitano

This canon addresses the subject of the profanation of sacred places, simplifying the formal and meticulous norms of cc. 1172–1177 of the *CIC*/1917, which was clearly informed by a conception of the sacred that is not very much in agreement with today's mentality.[1]

Those actions considered gravely injurious, and suitable to defile a sacred place, are not conceived as a stain in a physical sense, which appears immediately as soon as the deed takes place. For defilement to occur in a juridical sense, it is required that: an injurious action be performed inside a sacred place; that it give scandal to the faithful; and that, according to the local ordinary, it be grave and against the sanctity of the place.[2]

Once this change of perspective from an objective criterion to a predominantly subjective one was adopted, it was no longer possible to enumerate the actions that determine the profanation, and it was not even necessary to provide precise procedures of reparation, for which we are now referred to the liturgical books.

A point made in the plenary session of 1981 (the only one that referred to the introductory canons about sacred places and times) was that precise norms "de violatione et reconciliatione sacrorum locorum" should

1. Cf. *Comm.* 12 (1982), p. 329.
2. Cf. J. MANZANARES, commentary on c. 1211, in *Salamanca Com*; J.T. MARTÍN DE AGAR, commentary on c. 1211, in *Pamplona Com.*

be formulated, in view of the fact that these were disciplinary subjects, which were not to be left to the contingent prescriptions of the liturgical books.[3]

The Commission did not adopt this suggestion because it considered that the three criteria mentioned before were sufficient (the grave action, the scandal of the faithful, and the ordinary's judgment) and also because it considered that it was not the responsibility of the *CIC* to produce a penitential rite.[4]

The *Caeremoniale Episcoporum*, in its formulation of this rite, provides some indications for determining the gravity of the action, such as those that result in the profanation of the divine mysteries—more specifically the eucharistic species—or when they gravely offend the dignity of mankind or of society.[5]

It should be taken into account that the *CIC* provides that whoever profanes a sacred object, moveable or immovable, should be punished with a "just penalty" (c. 1376).

3. Cf. *Comm.* 15 (1983), p. 247.
4. Cf. ibid.
5. Cf. *Caeremoniale Episcoporum* (Typis polyglottis Vaticanis 1985), no. 1070, pp. 247–251.

1212 **Dedicationem vel benedictionem amittunt loca sacra, si magna ex parte destructa fuerint, vel ad usus profanos decreto competentis Ordinarii vel de facto reducta permanenter.**

Sacred places lose their dedication or blessing if they have been in great measure destroyed, or if they have been permanently made over to secular usage, whether by decree of the competent Ordinary or simply in fact.

SOURCES: c. 1170

CROSS REFERENCES: cc. 1171, 1222, 1224 § 2, 1238, 1239 § 1, 1269

COMMENTARY

Adolfo Longhitano

This norm, which in the *CIC*/1917 referred only to churches (c. 1170), is currently included in the introductory canons that refer to all sacred places. Taking into account the juridical effects that the legislator associates with the dedication-blessing, it was necessary to establish in what way a sacred place loses its sacred character and is allocated for profanes uses.

The loss of the consecration of a sacred place can be verified by two causes: its destruction (of the whole or of most of it), and its permanent reduction to a profane use. The latter can be either of fact or of law, depending on whether it is determined by a permanent use or by a decree of the ordinary.

The canon, by making the loss of consecration result from permanent secular usage of the sacred place, intends to limit itself to the verification of the fact, not to evaluate the intentions of the person who decided on it. The proposal to abolish the expression "de facto" had already been presented during the works of the Commission, to prevent anyone from taking advantage of the profane use of a sacred place in bad faith. This observation was not accepted because there was no intention of defining the legality or illegality of profane use, but only of determining the juridical effects that derive from it.[1] It would not make any sense to go on considering as sacred a place that had been for centuries assigned for profane uses, only because an illicit act had initially been committed.

1. Cf. *Comm.* 12 (1980), pp. 331–332.

The norm provided by c. 1222 should be taken into account particularly for the loss of the consecration of churches.

The loss of the consecration of a church due to the reasons provided in this canon does not entail the automatic loss of the dedication or blessing of the fixed altar or the movable altar if it is transferred to a different place (c. 1238 § 2).

1213 Potestates suas et munera auctoritas ecclesiastica in locis sacris libere exercet.

Ecclesiastical authority freely exercises its power and functions in sacred places.

SOURCES: cc. 1160, 1179

CROSS REFERENCES: cc. 134, 381

COMMENTARY

Adolfo Longhitano

Canon 1160 of the *CIC*/1917, which is where this norm comes from, had a very different meaning: in the preliminary canons the intention was to fix a general principle of the exemption of sacred places from civil jurisdiction, to justify then the right of asylum formulated in c. 1179 for the churches.

This privilege, which in previous centuries had provoked so many controversies both at a theological and at a practical level,[1] in 1917, although it had been reduced, was more of a historical memory than a right or a practice that the Church may have been able to invoke.[2] The Reform Commission, aware of the radical change of mentality that had taken place while the *CIC*/1917 was in force, thought it appropriate to make certain modifications: it eliminated the first part of the canon, in which the exemption of sacred places from civil jurisdiction was provided, and left practically unaltered the second one: "Auctoritatis ecclesiasticae est propriam potestatem regiminis in locis sacris libere exercere."[3]

This proposal met with plenty of obstacles in the consultation and discussion phase. It was brought to everyone's attention that the anticipated norm was useless, since civil authorities no longer intended to acknowledge the "freedom" of exercise of the ecclesiastical jurisdiction in sacred places. Others, however, argued that it was necessary to vindicate

1. Cf. F.L. FERRARIS, "Immunitas ecclesiastica et ecclesiarum," in *Prompta bibliotheca canonica, juridica, moralis, theologica*, IV (Paris 1858), cols. 317–406; G. VISMARA, "Asilo (diritto di), Diritto intermedio," in *Enciclopedia del Diritto*, III (Milan 1958), pp. 198–203.

2. Cf. L.R. MISSEREY, "Asile en Occident," in R. NAZ (Ed.), *Dictionnaire de Droit canonique*, I (Paris 1935), cols. 1089–1104; H. WAGNON, "Eglises," ibid., V, Paris 1953, cols. 171–211: 202–205; P. CIPROTTI, "Asilo (diritto di), Diritto canonico eds ecclesiastico," in *Enciclopedia del Diritto*, III (Milan 1958), pp. 203–204.

3. *Comm.* 12 (1980), p. 332.

the Church's right to its own autonomy, and to its own freedom in sacred places regardless. An intermediate solution was finally accepted, which appears in the present canon, where there is no reference to the power of governance in isolation, but just to the "powers" of the Church.[4]

This canon, taking into account the way in which it was formulated, changes our perspective completely. The free exercise of the powers and offices vindicated by the legislator cannot be interpreted in polemical opposition to civil jurisdiction or in reference to the right of asylum, which is no longer mentioned in the *CIC*, but only as the reinstatement of right that the Church intends to exercise in sacred places within the diverse context in which it now carries out its mission.[5]

The civil legislation of the different countries normally guarantees the proper religious authorities a minimum autonomy over sacred places, even though they can no longer acknowledge the right of asylum in the way that it was conceived in the Middle Ages within the general sovereignty of the State.

4. Cf. ibid.
5. Cf. J.T. MARTÍN DE AGAR, commentary on c. 1213, in *Pamplona Com*; T. RINCÓN, "Disciplina canónica del culto divino," in *Manual de Derecho canónico*, 2nd ed. (Pamplona 1991), p. 593.

CAPUT I
De ecclesiis

CHAPTER I
Churches

1214 **Ecclesiae nomine intellegitur aedes sacra divino cultui destinata, ad quam fidelibus ius est adeundi ad divinum cultum praesertim publice exercendum.**

The term church means a sacred building intended for divine worship, to which the faithful have right of access for the exercise, especially the public exercise, of divine worship.

SOURCES: c. 1161

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

1. *Definition of church*

The Latin name *ecclesia* was adopted in the first centuries of Christianity. It initially referred to the community of the faithful and later to the place itself where they gathered to listen to the divine Word, to celebrate the Eucharist and to receive the sacraments. But this was not the only term used. Between the first and fourth centuries of the Christian age, a wide variety of proper nouns was used to distinguish this place from the pagan *templum.* These names were: *domus Dei, domus orationis, domus Ecclesiae, ecclesia, martyrium,* and *basilica.*[1] During the following centuries, the use of the term *ecclesia* became widespread.

1. C. MOHRMANN, "Les dénominations de l'Église en tant qu'édifice en grec et en latin au cours des premiers siècles chrétiens," in *Revue des Sciences Religieuses* 36 (1962), pp. 155–174.

The real definition of *church* is provided in the present canon, which assigns the following essential elements to this concept:

a) *Sacred building*

The term *building* refers to a material construction of a stable character, attached to the ground. Hence, it cannot refer to a movable construction, such as a cart traveling overland, a ship moving over the sea, or a plane moving across the sky.

The term *sacred* indicates that the construction is a visible sign of that spiritual reality: the mystery of the Church. In a more profound sense, the construction indicates divine revelation. The temple was already in the Old Testament the sign of the special presence of God among the chosen people. In the New Testament, this construction signifies the New Covenant between God and mankind performed by Christ (Jn 1:14; 2:21); it is the place where the faithful become the dwelling of the living God (1 Cor 3:9–17; Eph 2:19–22; 1 Pet. 2: 4–10), the place where the Father is adored in spirit and in truth. John Paul II teaches that a church is the visible sign that helps humanity understand the truth that God lives in the community of his people, founded by Christ on earth.[2]

b) *Assignment of that building to the exercise, especially the public exercise, of divine worship*

The assignment of this building to the majority of the faithful has an essential meaning. This element makes the church different from the oratory and the private chapel, which are reserved to specific groups of the faithful or to certain physical persons (cc. 1223, 1226).

2. *Right of the faithful to access to this building to participate in acts, above all public acts, of divine worship*

This is a new element that was not emphasized in the definition of church provided by the *CIC*/1917, c. 1161. Only the function of providing access to the church for service to the faithful was stressed there. In the present canon, the subjective right of the Christian faithful to have access to this building is also stressed. This entails the realization of the fundamental right of all Christian faithful to participate in the acts of divine worship. The faithful can exercise this right in accordance with the rite to which they belong (c. 214) and as long as they have full communion with the Church (c. 205). As far as the authority of the Church is concerned, the correlative obligation to guarantee the faithful the exercise of this right prevails. The ecumenical bases of the Vatican Council II have brought along with them the moderation of the discipline concerning the access to

2. JOHN PAUL II, *Allocuzione in Costa d'Avorio*, September 10, 1990, in *AAS* 83 (1991), p. 230.

Catholic churches of Christians belonging to separated Churches (*OE* 26–28). According to the *Ecumenical Directory,* Christians belonging to separated Churches and communities can use Catholic churches for worship with the consent of the local ordinary, which can only be granted in case of necessity (DE/1993, 137).

3. *Classification of churches*

Regarding the rank assigned to the church by custom or by the proper ecclesiastical authority, and also regarding the effects that are derived from this rank, we can distinguish three different categories of churches:

— *Cathedral church.* It is the center of liturgical and pastoral life of the diocese. The bishop solemnly takes possession of the diocese in it (c. 382 §§ 3–4) and often presides at the celebration of the Eucharist (c. 389). We can distinguish the following types of cathedral churches: patriarchal, primatial, and metropolitan. The cathedral church is equivalent in law to the main church of an abbey, and the ones of the local prelature, the apostolic vicariate, and the apostolic.

— *Parish church.* It is the center of liturgical and pastoral life of the parish and is the residence of the parish priest (c. 533 § 1).

— *Rectorial church.* This is where the office of the rector of the church resides, and where he performs the liturgical function (c. 559).

— *Religious church,* which belongs to a religious institute.

— *Church of a society of apostolic life.*

— *Church of a personal prelature.*

— *Collegiate church,* in which the collegial chapter is erected.

— *Sanctuary,* a church to which the faithful go on pilgrimage (c. 1230).

— *Basilica.* This is a church that holds the title by virtue of an ancient custom or concession of the Holy See. Special privileges are attached to this title. Basilicas can be major or minor. The following churches belong to the category of major basilicas, also known as patriarchal: five churches in Rome (St. Peter in the Vatican, St. John Lateran, St. Mary Major, St. Paul Outside the Walls, St. Lawrence Outside the Walls) and two in Assisi (St. Francis and St. Mary of the Angels).[3] Minor basilicas are churches located outside of Rome to which the Roman Pontiff has granted this title due to the special role that they play in the life of the

3. PAUL VI, mp *Peculiare ius,* February 8,1966, in *AAS* 58 (1966), pp. 119–122; mp *Romanae Dioecesis,* June 30, 1968, in *AAS* 60 (1968), pp. 377–381.

community of the faithful. The title of basilica indicates a closer bond between the church and that of St. Peter in the Vatican. The nature and privileges of these basilicas are specified in the decrees of the Holy See.[4]

4. For the names of the current minor basilicas, cf. SCRit, Decr. *Domus Dei*, June 6, 1968, in *AAS* 60 (1968), pp. 536–539; *CDWDS*, Decr. *Domus Dei*, November 9, 1989, in *AAS* 81 (1990), pp. 436–440.

1215 **§ 1. Nulla ecclesia aedificetur sine expresso Episcopi dioecesani consensu scriptis dato.**

§ 2. Episcopus dioecesanus consensum ne praebeat nisi, audito consilio presbyterali et vicinarum ecclesiarum rectoribus, censeat novam ecclesiam bono animarum inservire posse, et media ad ecclesiae aedificationem et ad cultum divinum necessaria non esse defutura.

§ 3. Etiam instituta religiosa, licet consensum constituendae novae domus in dioecesi vel civitate ab Episcopo dioecesano rettulerint, antequam tamen ecclesiam in certo ac determinato loco aedificent, eiusdem licentiam obtinere debent.

§ 1. No church is to be built without the express and written consent of the diocesan Bishop.

§ 2. The diocesan Bishop is not to give his consent until he has consulted the council of priests and the rectors of neighbouring churches, and then decides that the new church can serve the good of souls and that the necessary means will be available to build the church and to provide for divine worship.

§ 3. Even though they have received the diocesan Bishop's consent to establish a new house in a diocese or city, religious institutes must obtain the same Bishop's permission before they may build a church in a specific and determined place.

SOURCES: § 1: c. 1162 § 1; *SArt* 544
§ 2: c. 1162 §§ 2 et 3; *SArt* 544
§ 3: c. 1162 § 4

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

1. According to § 1, no church can be built without the consent of the diocesan bishop. This means that:

a) The competence to authorize the construction of a new church is reserved to the diocesan bishop. The *CIC*/1917 reserved this competence to the local ordinary, but in strict reference to the diocesan bishop.[1] The

1. E. SZTAFROWSKI, *Miejsca i czasy swiete* (Warsaw 1982), pp. 34–37.

same competence is assigned to those who govern particular churches with powers equivalent in law to those of the diocesan bishop, in other words, apostolic vicars and prefects, apostolic administrators, abbots and local prelates (cc. 368, 370, 371, 381). Episcopal vicars and vicars general do not, however, have this competence, unless it has been assigned to them by the diocesan bishop. According to the norms of the *CIC*, diocesan administrators do not have this competence but can receive special faculties from the Holy See when the situation of a vacant see continues for an extended period of time.

b) Whoever wants to build a new church, be it a physical or juridical person, must ask for the consent of the diocesan bishop in whose territory the church is to be built.

2. The consent of the bishop for the construction of a new church must be explicitly manifested in writing (c. 1215 § 1). This very principle was adopted by the *CIC*/1917, c. 1161. The requirement of an *explicit* consent indicates that the tacit or implicit consent of the bishop for the construction of a church must be considered as nonexistent. Besides, it is required that the consent be granted in writing, so an oral consent would not be sufficient. The requirement that it be in writing is essential so that there can be evidence of it. To begin the construction of a new church without the consent of the bishop, expressed in these terms, is illegal.

3. The diocesan bishop must perform a previous analysis regarding the existence of sufficient reasons. According to § 2, this analysis will consider the following elements:

a) To establish whether a new church "can serve the good of souls;" in other words, whether the construction responds to the spiritual needs of the faithful, as is the case, for instance, when a church must be built in a new neighborhood to take care of the pastoral needs of the faithful who live in it.

b) To make sure that there will be sufficient material means for the construction of the church, and to maintain in it the exercise of divine worship in the future. Paragraph 2 does not indicate the sources from which these material means must be obtained; they normally come from the offerings of the faithful for whom the church is built, but they can also come from other sources. We are particularly reminded here of the fund for the construction of churches that must be created in all dioceses (*DPMB*, 178 and 182).

4. In order for this analysis of the existence of sufficient reasons to authorize the construction of a new church to be carried out, the bishop must gather all necessary information. In § 2, the bishop is required to ask for the opinion of the presbyteral council and of the rectors of the neighboring churches. The need to listen to the presbyteral council is a new requirement that was not present in the *CIC*/1917. The requirement to gather the opinion of the rectors of the neighboring churches, however, was already present in c. 1162 § 3 of the *CIC*/1917.

It is particularly important that pastors of parishes be included in the group of the rectors of the neighboring churches to be consulted since their interests can be affected by the construction of a new church. The Code does not specify in what way these opinions should be issued, but it seems appropriate to suggest that, for the purpose of gathering evidence, they be issued in writing; forexample, the minutes of the presbyteral council or the protocol of the conversation of the bishop with the rector of a neighboring church. This requirement to gather these opinions is necessary for the validity of the consent of the bishop to the construction of the church. If the bishop does not listen to these reports, his decision is invalid (c. 127 § 2, 2°). The bishop is not required to act in agreement with the opinion expressed by the presbyteral council, or that of the rectors of the churches; he can decide differently if he has reasons that are stronger than those presented as a foundation of the opinions he has received.

5. A religious institute, even if it has received the consent of the bishop for the founding of a house in the diocese or in the episcopal city, can only begin to build a church once it has obtained the authorization of the bishop to do so in a specific and definite place, according to what is provided in § 3. This emphasizes the requirement provided in c. 1162 § 4 of the *CIC*/1917.

This norm can only be applied when the construction of a church is undertaken by a clerical religious institute, following c. 588 § 2. The consent of the bishop for the clerical, religious institute to build a new house, following the provisions of c. 611 § 3, already entails consent to build a new church. The reason for this is that one of the essential goals of a clerical institute is to exercise pastoral life. The consent of the bishop to build the house of a lay institute, however, does not entail the consent to build its own church, but only an oratory.

It is typical here to make a distinction between the consent and the permission of the bishop for the construction of a new church by a clerical institute. The consent of the bishop for the foundation of a new house of a particular institute in the territory of the diocese involves the consent by the proper religious authority for the construction of that new house; this authority grants the right to build its own church in which the institute will carry out its pastoral activity. The institute, however, can only begin to build its own church, or to exercise the right to its own church once it has obtained the license to build it in a specific and definite place. In other words, a further administrative act of the bishop is necessary in the form of a permission regarding the location of the church. The bishop can deny the institute this permission due to pastoral reasons; for instance, if there is already a parish church in the vicinity of the place where the institute wants to build its own church. He cannot, however, deny the permission to build the church in a different place that is more appropriate from a pastoral point of view.

1216 **In ecclesiarum aedificatione et refectione, adhibito peritorum consilio, serventur principia et normae liturgiae et artis sacrae.**

In the building and restoration of churches the advice of experts is to be used, and the principles and norms of liturgy and of sacred art are to be observed.

SOURCES: c. 1164 § 1; *MD* IV; *SArt* 542–546; *SC* 123–128; *IOe* 13c, 90–99; *EMys* 24, 52–56; GIRM 253, 254, 256–280; HCW 6, 9, 10; RDCA ch. II, 3

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

The individuals in charge of the construction or the restoration of churches must meet certain requirements related to liturgy and sacred art.

1. They must obtain permission from the experts, who in this case should mainly be experts in matters of sacred art and liturgy.

2. They must respect the criteria of liturgy and sacred art. This duty does not only concern diocesan bishops, but also rectors of churches and all those interested in the construction or restoration of a particular church. This norm is in part new; the *CIC*/1917 required the gathering of advice from experts and to follow the criteria "a traditione christiana receptae et artis sacrae legis" (*CIC*/1917, c. 1164). The code currently gives priority to the duty of respecting the principles and norms of the liturgy. This entails an acceptance of the guidelines of the Vatican Council II (cf. *SC* 122–129), established so that the artistic styles that were followed in the past for the construction of churches are taken into account, while at the same time continuing to have a receptive attitude toward modern art, in particular in the respect of local traditions and styles.

In the new churches, it is necessary, above all, to respect liturgical norms and principles so that the church can be a house of prayer and faith. Bishops should constitute a commission for sacred art, liturgy, and sacred music in each diocese (*SC* 44–46). The guidelines of the Council have been specified by the instructions of the Holy See[1] and of the bishops' conferences.

1. Cf. *IOe*; *EMys*; GIRM (ed. typ. 1979), ch. V.

1217 **§ 1. Aedificatione rite peracta, nova ecclesia quam primum dedicetur aut saltem benedicatur, sacrae liturgiae legibus servatis.**

§ 2. Sollemni ritu dedicentur ecclesiae, praesertim cathedrales et paroeciales.

§ 1. As soon as possible after completion of the building the new church is to be dedicated or at least blessed, following the laws of the sacred liturgy.

§ 2. Churches, especially cathedrals and parish churches, are to be dedicated by a solemn rite.

SOURCES: § 1: c. 1165 §§ 1, 2 et 4, 1166, 1167; GIRM 255; RDCA ch. II, III et V
§ 2: c. 1165 § 3; GIRM 255; RDCA ch. V, 1

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

The designation of the church as a sacred place, in accordance with the desire of the ecclesiastical authority, is performed by means of a proper liturgical rite. This rite can take place in the form of a solemn dedication or of a simple blessing. The ecclesiastical discipline concerning the need to adopt these rites has evolved considerably throughout time. In antiquity, dedication was always required; it was substituted in the Middle Ages by the blessing. The dedication of a church that was not built with stones or bricks was even forbidden.[1] The *CIC*/1917 had already forbidden the dedication of a church built with wood, iron, or any other metal (*CIC*/1917, c. 1165 § 4). These prohibitions have been abolished by the Code, which provides the following norms:

1. All churches must be dedicated or blessed (§ 1). This means that both the dedication and the blessing produce the same essential effect, in other words, the bestowal of sacred character on the building. It can be implied, however, from the disposition of § 1 of the present canon that dedication is the ordinary form of the rite of setting aside a building for sacred functions, whereas the blessing is nothing more than an extraordinary form.

1. T. ZIOLKOWSKI, *The Consecration an Blessing of Churches* (Washington 1943), pp. 5–20; J. BAKALARZ, "Miejsca i czasy swiete," in *Kommentarz do Kodeksu Prawa Kanonicznego*, III (Lublin 1986), pp. 389–390.

2. The Code especially prescribes that cathedral churches and parish churches be dedicated with a solemn rite (§ 2), while the rest of the churches (i.e., non-parochial churches) can be just blessed. A church that has already been blessed can then be dedicated, mainly when there are substantial architectural modifications, or if its juridical situation changes; for instance, when a non-parochial church becomes a parish church or a cathedral.

3. Both the dedication and the blessing of a church must be performed according to the ceremony prescribed by the liturgical norms (§ 1). The ceremonial of the dedication and of the blessing of churches is provided by the Apostolic See.[2] The Bishops' Conference can provide some modifications of the ceremony of dedication, which take into account the special needs of the different countries. The officiating bishop can also adapt these norms to the special needs.[3]

4. The whole church, once the construction has been finished, must be dedicated or blessed "as soon as possible" (§ 1). This obligation is a result of the legislator's special interest in having the church ready to serve the purposes for which it has been built as soon as possible, as well as to avoid the use of the building assigned to serve as a church for profane purposes such as, theater plays.

2. *Ordo dedicationis Ecclesiae et Altaris* (Typis polyglottis Vaticanis 1977), ch. 2.
3. Ibid., ch. II, nos. 44–45.

1218 Unaquaeque ecclesia suum habeat titulum qui, peracta ecclesiae dedicatione, mutari nequit.

Each church is to have its own title. Once the church has been dedicated this title cannot be changed.

SOURCES: c. 1168; *SCDW* Normae, 19 mar. 1973 (*AAS* 65 [1973] 276–279); RDCA ch. II, 4

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

1. Every church must have its own title. This principle was already contained in the *CIC*/1917 (c. 1168), and the tradition of this norm can be traced back to antiquity. According to the liturgical norms in force, the titulars of a church can be: the Blessed Trinity, a mystery of the life of Christ that is present in the liturgy, the Holy Spirit, the Virgin Mary, under a name already accepted in the liturgy, the Holy Angels, and the saints inscribed in the Roman Martyrology or in one of its appendices.[1]

The *CIC*/1917 forbade the dedication of a church to a blessed (*beatus*), unless the Holy See authorized it (*CIC*/1917, c. 1168 § 3). The Code does not include this prohibition, which has, however, remained in liturgical law.[2] A blessed cannot be the titular of a church except by virtue of an authorization from the Holy See.

According to practice, the diocesan bishop chooses the name of the title at the moment of the blessing of the cornerstone and confirms it at the moment of the dedication or blessing of the church.

2. The title of the church cannot be changed after the dedication. The title of a church that has already been dedicated can only be changed if the Holy See authorizes it. The Code does not forbid the change of the title of a blessed church. Such a change can be made by the diocesan bishop.

The saint or blessed to whom the church is dedicated or with whose title it is blessed, must be distinguished from the patron of the church, even if they are one and the same.[3] The celebration of the anniversary of the dedication or blessing, as well as the feast of the patron of the church are regulated in the liturgical books.

1. *Ordo dedicationis Ecclesiae et Altaris* (Typis polyglottis Vaticanis 1977), ch. 2, no. 30.
2. Ibid., ch. II, no. 40.
3. SCDW, *Normae circa patronos constituendos et imagines B.M. Virginis coronandas*, March 25, 1973, no. 2, in *AAS* 75 (1973), p. 276.

1219 **In ecclesia legitime dedicata vel benedicta omnes actus cultus divini perfici possunt, salvis iuribus paroecialibus.**

All acts of divine worship may be carried out in a church which has been lawfully dedicated or blessed, without prejudice to parochial rights.

SOURCES: c. 1171

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

1. All the acts of divine worship can be performed in a church that has been legitimately dedicated or blessed. This norm was already present in c. 1171 *CIC*/1917.

It turns out that the norm is addressed to sacred ministers, who are the ones that, according to juridical principles, have the faculty of performing acts of divine worship. Acts of worship include the celebration of the liturgy (the Eucharist, the sacraments, sacramentals, the liturgy of the Word) and other sacred functions (spiritual exercises, catechesis, etc.). The diocesan bishop, among whose responsibilities is the leading of divine worship in the particular church, must make sure that the discipline regarding worship and the teaching of the word of God is respected (*LG* 29; *CD* 15; c. 392 § 2) in all the churches, even in those of exempt religious members.

2. The rights of the parish must be preserved in the exercise of the acts of divine worship. The scope of possibility of the exercise of acts of divine worship in non-parochial churches, consequently, is more limited than in parish churches. In the former, the liturgical functions that are reserved to the parish priest cannot be celebrated (cf. c. 530). The functions reserved to the parish priest can be celebrated in non-parochial churches only with the consent or delegation of the parish priest or of the local ordinary (cc. 558–559); thus, the delegation of the parish priest is necessary for assisting the celebration of a Christian marriage. The reason for this limitation is the priority that parish churches are granted and the authority held by the parish priest over the clerics that perform pastoral and liturgical functions in non-parochial churches.

1220 **§ 1. Curent omnes ad quos res pertinet, ut in ecclesiis illa munditia ac decor serventur, quae domum Dei addeceant, et ab iisdem arceatur quidquid a sanctitate loci absonum sit.**

§ 2. Ad bona sacra et pretiosa tuenda ordinaria conservationis cura et opportuna securitatis media adhibeantur.

§ 1. Those responsible are to ensure that there is in churches such cleanliness and ornamentation as befits the house of God, and that anything which is discordant with the holiness of the place is excluded.

§ 2. Ordinary concern for preservation and appropriate means of security are to be employed to safeguard sacred and precious goods.

SOURCES: § 1: c. 1178; *MD* IV; *SArt* 542–546; *SC* 122, 124; *PO* 5; *EMys* 24; GIRM 253; RDCA ch. II, 3
§ 2: cc. 1182 § 1, 1184, 1186; SCCouncil Instr. *In applicatione*, 25 iun. 1930 (*AAS* 22 [1930] 410–417); *SC* 126; *SCCong* Litt. circ., 11 apr. 1971 (*AAS* 63 [1971] 315–317)

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

1. "Those responsible" are obliged to make sure that churches maintain the cleanliness and decorum appropriate to the house of God. The term *those responsible* should be interpreted as meaning that this obligation applies most of all to the parish priests and rectors of churches, but also to other people who can be responsible for the maintenance of the cleanliness and decorum of churches. The object of this responsibility is not only the sacred building but also its interior, its furniture (altar, pews, confessionals, and baptistery) and the liturgical ornaments and objects.

2. At the same time, the legislator imposes on those subjects the obligation to make sure that no activity that may go contrary to the sanctity of a sacred place is performed. This prohibition refers to merely profane uses, such as theater plays or film screenings of an exclusively profane matter, political meetings, commercial exercises, etc. It is necessary to take into account here the disposition of extraordinary character provided by c. 827 § 4, which allows the church to sell only religious books and

magazines that have been published with the approval of the ecclesiastical authority.

Using a church for acts that present an ecclesial interest does not go against the sacred character of the church, even if they are not related to cult, such as religious conferences or sacred music concerts. Particular law, however, should be respected.[1]

3. The same subjects mentioned above have to take care of the ordinary maintenance of the sacred and precious goods that are inside the church, as well as adopting the necessary security measures (§ 2). The objects of this obligation are the sacred goods (the Eucharist, relics) and also sacred works of art. With this goal in mind, the best measures should be taken to preserve these objects, and the appropriate technical means should be used to protect them from theft, fires, vandalism, and profanations. Regarding this matter one should consult the opinion of experts and keep in mind the instructions provided by the authorities of the Church and of the State.

We conclude by indicating that previous law, and also the *CIC*/1917 (c. 1169) presented norms concerning the bells of the church. The current Code leaves this matter to particular law and to the liturgical books.

1. S. BELLUCO, *Luoghi e tempi sacri, in Il Diritto nel Mistero della Chiesa,* III (Rome 1980), p. 392.

1221 Ingressus in ecclesiam tempore sacrarum celebrationum sit liber et gratuitus.

Entry to a church at the hours of sacred functions is to be open and free of charge.

SOURCES: c. 1181

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

1. Entry to a church during sacred functions must be "open." This is a new disposition, which was not present in the *CIC*/1917. It has been included in the Code as a consequence of the definition of *church* provided in c. 1214, in which the right of the faithful to enter a church to participate in the acts of divine worship is included as a new element. For this reason, an arbitrary limitation on the possibility of accss to the church for the faithful who wish to participate in acts of worship is prohibited.

It is clear, however, that the rector of a church can forbid the entrance into it by those individuals who behave in a way that is detrimental to the necessary atmosphere of piety during liturgical ceremonies;[1] for instance, tourists that are only interested in visiting the church because of its artistic value. For security reasons, the church must be closed during the hours when no liturgical or pastoral activities are taking place. On the other hand, in those churches where the Blessed Sacrament is reserved, the faithful must be granted access at certain times during the day other than those dedicated to liturgical activity, so that they can perform their personal acts of devotion (c. 937).

2. Entry to a church during the sacred functions must be "free of charge." This entails forbidding that access to the church be dependent on buying a ticket, a prohibition that was also present in c. 1191 of the *CIC*/1917.

Consequently, one must avoid any practices against this principle; thus, it is, for instance, forbidden to require any amount of money to occupy a place in a pew during liturgical ceremonies. On the other hand, one can charge reasonable amounts of money that are assigned to the preservation of the altars and works of art to people visiting a church because of its artistic value, outside the time dedicated to sacred functions.

1. T. PAWLUK, *Prawo Kanoniczne według Kodesku Jana Pawła II*, II (Warsaw 1986), p. 467.

1222 **§ 1. Si qua ecclesia nullo modo ad cultum divinum adhiberi queat et possibilitas non detur eam reficiendi, in usum profanum non sordidum ab Episcopo dioecesano redigi potest.**

§ 2. Ubi aliae graves causae suadeant ut aliqua ecclesia ad divinum cultum amplius non adhibeatur, eam Episcopus dioecesanus, audito consilio presbyterali, in usum profanum non sordidum redigere potest, de consensu eorum qui iura in eadem sibi legitime vindicent, et dummodo animarum bonum nullum inde detrimentum capiat.

§ 1. If a church cannot in any way be used for divine worship and there is no possibility of its being restored, the diocesan Bishop may allow it to be used for some secular but not unbecoming purpose.

§ 2. Where other grave reasons suggest that a particular church should no longer be used for divine worship, the diocesan Bishop may allow it to be used for a secular but not unbecoming purpose. Before doing so, he must consult the council of priests; he must also have the consent of those who could lawfully claim rights over that church, and be sure that the good of souls would not be harmed by the transfer.

SOURCES: § 1: c. 1187
§ 2: *SCCong* Litt. circ., 11 apr. 1971, 6 (*AAS* 63 [1971] 317)

CROSS REFERENCES: —

COMMENTARY

Józef Krukowski

Ancient canon law provided a strict principle according to which, once a church had been dedicated to divine worship, it could no longer be assigned to any other human use (cf. *VI Regula iuris* 51). The *CIC*/1917 introduced a mitigation of this principle, granting local ordinaries the faculty to assign the church to non-sordid profane uses, on the condition that the church was no longer suitable for dedication to divine worship, and its restoration was not possible (*CIC*/1917, c. 1187). The Code has substantially broadened the competence of diocesan bishops in this matter.

According to the present canon, diocesan bishops can dictate a decree of closure of a church and of its reduction to a profane but not sordid

use, if certain requirements are met. Two situations have been defined regarding the margin of discretion that the legislator grants bishops:

1. Diocesan bishops can assign a church to a profane use as long as these conditions are met:

a) That the church be in such a state that it can by no means be used for divine worship, for instance, because a considerable part of the building has been destroyed (cf. c. 1212).

b) That the building cannot be repaired by any means. For instance, when the amount of money necessary for its restoration is higher than the financial resources of a particular community of the faithful, and no other resources can be found.

These conditions clearly must be met. In these cases the legislator does not provide that bishops have to obtain any person's or group's opinion or consent to make this decision; it is, however, clear that bishops must listen, to the extent that this is necessary, to the opinions of the experts before issuing a decree.

2. The diocesan bishop can reduce the church to a profane use also when "other grave circumstances" lead him to exclude the church from an ulterior use for divine worship. It could be the case, for instance, that a church not be in ruins, but that, due to a change of residence, the faithful no longer participate in the liturgical celebrations that take place in it. In these cases, bishops must fulfill certain requirements before making a decision:

a) Listening to the opinion of the presbyteral council.

b) Gathering the consent of the people that "legally hold rights" over the church, such as an association of faithful that owns it.

c) Being certain that "the good of the souls would not be harmed" as a consequence of this decision

The bishop's failure to meet these conditions results in the illegality of the act of reduction of the church to the profane use. In view of c. 127 § 2,1°–2°, we can deduce that the bishop's failure to meet the abovementioned requirements in a) and b) results in the invalidity of the act, and can also be a cause for granting compensation of damages to the person whose legitimate rights may have been damaged. On the other hand, the decision taken by the bishop once he has listened to the presbyteral council is valid, even if it is not in agreement with the opinion expressed by the council.

Bishops, before issuing the decree of reduction of a church to a profane use, must make sure that they act in a way that avoids creating conflicts with the faithful that had until that moment enjoyed the right of access to that church, for instance, by suggesting to them a church that is closer to their residences.

A diocesan bishop's competence in these two possible situations is limited by the same clause: that the church not be assigned to a "sordid use." The danger that such an assignment involves is that a building, which was up to that moment a sacred place, may be used by its new owner for uses that are incompatible with the principles of morality and good manners.

When a church that has been reduced to a profane use is sold, one must respect the norms regarding the disposal of the Church's patrimony (cc. 1291–1294).

CAPUT II
De oratoriis et de sacellis privatis

CHAPTER II
Oratories and Private Chapels

1223 **Oratorii nomine intellegitur locus divino cultui, in commodum alicuius communitatis vel coetus fidelium eo convenientium de licentia Ordinarii destinatus, ad quem etiam alii fideles de consensu Superioris competentis accedere possunt.**

An oratory means a place which, by permission of the Ordinary, is set aside for divine worship, for the convenience of some community or group of the faithful who assemble there, to which however other members of the faithful may, with the consent of the competent Superior, have access.

SOURCES: c. 1188; *DPMB* 90a, 180

CROSS REFERENCES: —

COMMENTARY

Ernesto Peñacoba

1. *Historical origin*

It seems that oratories originated when the first places of worship began to be substituted by churches and basilicas. After the peace of Constantine, it often happened that when a church of large dimensions was built, the earlier places of worship were attached as places of prayer.[1]

1. Cf. J. PLAZAOLA, "Oratorio," in *Gran Enciclopedia Rialp* (Madrid 1973).

It is also possible that oratories may have originated as places built expressly to honor the memory of the martyrs. In any case, Greek writers started distinguishing oratories from basilicas and churches in the fourth century. It is not easy to decide whether oratories were only used to pray and sing psalms, as St. Augustine recommended, or whether they were also used for liturgical celebrations of a group of people or a small community. There are plenty of testimonies that say that oratories *solius orationis gratia* were always allowed to the faithful, and that the number of them multiplied as they were built in houses, palaces, and castles during the Middle Ages. In the ninth century, however, some bishops warned that they reserved for themselves the right to grant the faculty to celebrate Mass in private chapels; from the Council of Trent onwards, this became the exclusive right of the Roman Pontiff. Authority began very soon to intervene, providing norms and laws concerning the different places assigned for worship. Thus, for instance, in the Council of Laodicea (a. 320), a restriction of worship in private houses was provided to avoid the proliferation of heretical and schismatic sects, although very soon, in the sixth century, the legality of private oratories *solius orationis gratia* and the bishop's right to allow its existence were already acknowledged.[2]

In the centuries since the Council of Trent, we can find authors that dealt specifically with the subject of oratories and distinctions between them began to be made, such as that between public and private oratories.[3]

The *CIC*/1917, title X of book III, dedicates cc. 1188–1196 to oratories. In view of previous legislation, it sanctioned the distinction—in force until the promulgation of the current Code—between public, semi-public, and private oratories. Presently, the *CIC* in book IV ("The Sanctifying office of the Church") dedicates cc. 1223–1229 to this subject.

When the works of the Commission constituted for the elaboration of a new Code began, the *coetus consultorum* in charge of preparing the *schema* "de locis et temporibus sacris" provided a series of revision criteria that are, in synthesis: *a)* to eliminate everything that is strictly liturgical, because it was seen to be preferable due to the particularities that can arise, and because these norms were already present in the new liturgical regulations that were a result of the liturgical reform; *b)* to suppress those norms that give excessively minute or trivial details; *c)* to take into account all the changes that the Holy See had introduced in the Church's general legislation: *d)* and finally, to work in accordance with the norms and decrees issued by the Vatican Council II, specially where the

2. Cf. H. LECLRECQ, "Oratoire," in *Dictionnaire d'Archéologie Chrétienne et de Liturgie* (Paris 1936).
3. Cf. P. HUIZING, "De auctoritate Ordinarii Loci relate ad rectores ecclesiarum non paroecialium et oratorium," in *Periodica de re morali, canonica, liturgica* 44 (1955), pp. 175–195.

ecumenical spirit is concerned.[4] With these criteria, the matter is considerably reduced in comparison with the *CIC*/1917.[5]

Thus, in the Code, anything regarding licenses, functions that can be performed in oratories, powers of the local ordinaries, of the Holy See, dispensations, etc., which were created to discipline and regulate the liturgy, with all the variations that circumstances and places require, are greatly simplified. The disappearance of the distinction between public and semi-public oratories is particularly relevant, and private oratories are called private chapels. This decision seems to have been definitely influenced by the same "crisis" of the notion of church that was present in the *CIC*/1917, since the Code itself (c. 1191) explicitly says that public oratories are "eodem iure quo ecclesiae," and no distinction is made between these oratories and churches "quae tantummodo e fine originario erectionis aedium desumitur."[6] On the other hand, although the distinction between public and private oratories is very old, the concept of semi-public oratory dates back only to the end of the last century.

2. *Notion of oratory*

An oratory is, then, a place assigned for divine worship, which, unlike churches, is not primarily built for the use of all the faithful, but for the benefit of a community or a group of the faithful.

Canon 1223 defines oratories in terms that are similar to the way in which it defines churches: as places assigned to divine worship. The right to assign certain places for prayer and other practices of personal piety on behalf of the faithful is recognized from antiquity. This is why, when defining oratories as well as chapels, as places assigned for divine worship, this is done in the precise sense provided by c. 834. In other words, they are assigned for worship that is offered in the name of the Church and by people who are legitimately designated. This is precisely what motivated the intervention of the authority. We are dealing here with oratories in a precise sense, and not in a general sense; nothing prevents a faithful person from dedicating a place to private prayer. On the other hand, although oratories are defined as "locus" as opposed to the church, which is defined as an "aedes" (building), this distinction seems irrelevant from a juridical point of view, even though it suggests a material distinction that may refer to their provisional nature and stability. Stability is a requirement provided in the Rite of Dedication of a Church and an Altar, III, 1–2 (also in the *Ceremoniale Episcoporum*, 864–865).

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4. Cf. *Comm.* 4 (1972), pp. 160–161.
5. J. MANZANARES, "In schema de locis et temporibus sacris deque cultu divino animadversiones et vota," in *Periodica de re morali, canonica, liturgica* 68 (1979), p. 140.
6. *Comm.* 4 (1972), p. 161

What characterizes oratories in the first place is that access is restricted (celebrations of worship in churches are by right open to all and entry must be open and free of charge, even though this right can be limited outside of the celebrations). The use of oratories is restricted to the beneficiaries and other people with the consent of the competent superior.

The law also indicates that oratories are built for the benefit of a community or group of the faithful; this is said without a technical specification of "alicuius communitatis vel coetus fidelium." We are dealing with terms that are similar to those used by the *CIC*/1917: "alicuius collegii aut etiam privatorum." Evidently, the disjunctive *aut* implies a greater contrast than *vel*; perhaps this is why the commentators used to distinguish two types of public oratories: one that was similar to semi-public oratories and another one that was similar to private ones, according to whether the oratory was assigned for the use of a *collegio* or of private individuals. There was, consequently, no other criterion to differentiate public oratories from the rest other than free access by the faithful during liturgical ceremonies, thus creating a new confusion between the concept of church and that of public oratory. The *CIC* clarifies and simplifies the issue. On the one hand, the use of the *vel* suggests that there is no relevant distinction—there do not exist two "types" of oratories—according to the use that is given to the oratory, in other words, for the use of a community or a group of faithful. On the other hand, access to the oratory is in any case restricted, which avoids confusion with the concept of church.

As far as the terms *communitatis* and *coetus fidelium* are concerned, the lack of a greater determination indicates that we are not necessarily dealing with a moral person strictly speaking, and that it is sufficient for the individuals to be delimited by some common characteristic or activity; hence, it could be a religious community, as c. 608 prescribes, or a community of people that can be delimited by the fact that they all belong to a civil or religious association, or live in the same place for a period of time, or participate in a formative activity, etc. The entry of other individuals is left to the judgment of the competent superior. The broad scope of the norm allows for the increasingly diverse pastoral realities that the evangelizing task of the Church must face and that require special attention.

1224 **§ 1. Ordinarius licentiam ad constituendum oratorium requisitam ne concedat, nisi prius per se vel per alium locum ad oratorium destinatum visitaverit et decenter instructum reppererit.**

§ 2. Data autem licentia, oratorium ad usus profanos converti nequit sine eiusdem Ordinarii auctoritate.

§ 1. The Ordinary is not to give the permission required for setting up an oratory unless he has first, personally or through another, visited the place destined for the oratory and found it to be becomingly arranged.

§ 2. Once this permission has been given, the oratory cannot be converted to a secular usage without the authority of the same Ordinary.

SOURCES: § 1: c. 1192 §§ 1 et 2; *DPMB* 180
§ 2: c. 1192 § 3

CROSS REFERENCES: —

COMMENTARY

Ernesto Peñacoba

1. *Preliminary clarifications*

The permission is not a privilege, since the community or group of the faithful requests something that is already determined by common law, something that does not go *contra vel praeter ius commune*, which is what characterizes a privilege. Although permissions are considered as oral concessions,[1] they are rank equal to rescripts, so they can be also considered as administrative acts (cf. c. 59 § 2). These permissions are frequently granted in the form of a rescript when they are requested in writing.

The law regarding administrative silence (c. 57) can be applied to this kind of permission, as it is the case with other administrative acts. The legislation regarding recourse (cc. 1732–1739) can also be applied.

2. *Regarding the concept of the ordinary*

From the beginning (c. 1223), the ordinary's permission is presented as a requirement for the establishment of an oratory. According to the

1. Cf. E. LABANDEIRA, in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 330–331.

criterion provided by c. 134 § 1, an ordinary, when no other adjective is added, is that person that has ordinary, executive power over the community or group that builds the oratory. Besides the supreme authority, the diocesan bishop, and those who are equivalent in their own jurisdiction, the personal prelate (cf. c. 295 § 1), as well as the vicar general and the episcopal vicar, perform executive functions of leadership status. The superiors of religious institutes of pontifical right are also considered to be ordinaries. Accordingly, once the rights and duties of the local ordinary have been preserved (i.e., those that refer to the discipline of the sacraments), only the permission of the ordinary who has ordinary, executive power over the community or group that establishes the oratory is required. It has even been debated whether a religious house needs previous permission from the local ordinary for the establishment of the mandatory oratory, as c. 608 indicates.[2] This question can only be answered negatively, since *ubi obligatio, ibi ius*. Perhaps this is why cc. 1223 and 1224 do not talk about the local ordinary, but only the ordinary.[3]

To be more specific, c. 1224 itemizes the requirements and effects of the ordinary's permission. It requires, first of all, a visit *per se vel per alium* to the place for which the permission is requested prior to granting it. This precept is related both to the duty of making sure that liturgical laws are respected, as already provided for in c. 1216, and to ensure the protection and veneration that the house of God deserves (cf. c. 1220). In other words, the ordinary is responsible for judging the suitability of the chosen place and the dignity of its installation. We should remember that the Vatican Council II entrusted ordinaries with attentively guarding sacred places so that they are "suitable for the celebration of liturgical services and for the active participation of the faithful" (*SC* 124).[4] This does not seem to refer to the necessary value judgement in the case of churches (c. 1215, § 2) regarding their usefulness for the good of the faithful, means to support worship, etc., which are taken for granted in this case.

3. *Effects of the permission*

Paragraph 2 specifies in negative terms the effects of this permission; besides making the construction of the oratory possible, the permission implies that the oratory cannot be utilized for profane uses without the authorization of the same ordinary. This does not mean that the oratory becomes a sacred place, nor that this place becomes an ecclesiastical good. An oratory becomes a sacred place once it is blessed (cf. c. 1229).

2. Cf. J.B. BEYER S.I., "De novo iure circa vitae consecratae instituta et eorum sodales quaesite et dubia solvenda," in *Periodica de re morali, canonica, liturgica* 73 (1984), p. 446.
3. On the distinction between the ordinary and the local ordinary, cf. J.I. ARRIETA, in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 139–141.
4. GIRM, 253 emphasizes that sacred buildings "should be truly worthy and beautiful signs and symbols of heavenly realities."

And, it will only be an ecclesiastical good if it belongs to a public, juridical person in the Church (cf. c. 1258 § 1), since the ecclesiastical nature of a good is determined in relation to its proprietor. Nevertheless, in some ways, assignment to worship by means of the permission of the ordinary limits the rights of the private, juridical individuals who may be the proprietors of an oratory.

1225 In oratoriis legitime constitutis omnes celebrationes sacrae peragi possunt, nisi quae iure aut Ordinarii loci praescripto excipiantur, aut obstent normae liturgicae.

All sacred celebrations may take place in a lawfully constituted oratory, apart from those which are excluded by the law, by a provision of the local Ordinary, or by liturgical norms.

SOURCES: cc. 1191, 1193

CROSS REFERENCES: —

COMMENTARY

Ernesto Peñacoba

1. *Worship and liturgical laws*

Divine worship, any liturgical celebration, and especially the celebration of the Eucharist, are actions of Christ and of the whole Church, and they accordingly have a public and communal character, even if they are performed without the assistance and active participation of the faithful. This public character constitutes the *ratio legis* on which the necessary regulation by the authority is based not only for celebrations and liturgical books, but for places assigned to worship even if they are assigned to a specific group of faithful, as in the case of oratories, or to singular people as in the case of private chapels.

2. *General prescriptions*

Oratories are ranked equal with churches insofar as worship is concerned (this used to be the case just with public oratories), but they differ in the possibility of restricted use, since they are assigned to a specific *coetus fidelium*. It is important to note that the canons devoted to the discipline of the sacraments refer to the proper place of the celebration, arguing that it is the church *aut oratorium* (cc. 857–859, 932–964, 1011, 1118, 1179).

Hence, sacred celebrations can be held in all oratories legitimately constituted, within the limits provided by the law. Canon 1225 limits these possibilities: "all sacred celebrations may take place in a lawfully constituted oratory, apart from those which are excluded by the law, by a provision of the local Ordinary, or by liturgical norms."

During the process of writing the *CIC*, some authors suggested that it would be convenient to add a more specific regulation, even though it would go against some of the principles that informed the reform of the *CIC*; in other words, even though this would entail going into strictly liturgical or detail-oriented matters. More specifically, one author considered that the possibility of celebrating sacred actions in oratories should not be left *ad nutum sacerdotis*, without at least incorporating into the norm the local ordinary's opinion regarding the existence of pastoral reasons or the opinion of his delegates.[1] In order to avoid possible abuses, the norm of c. 1225 is clear enough and provides certain limits: "nisi quae iure aut Ordinarii loci praescripto excipiantur, aut obstent normae liturgicae." It is important to mention that in the corresponding meeting of consultors, they added to the old formulation ("nisi obstent... aut Ordinarius aliqua exceperit") the particle *legitime* ("aliqua legitime exceperit") as if to underline the non-arbitrary character of the possible prescription of the ordinary. Nothing is said about the parish rights, as in the case of churches (c. 1219), although it could happen, since the law, on referring to the place of celebration of the sacraments, tends to use the same expression: in the church, *aut oratorium.*[2]

It has been debated for some time whether oratories are places where the Sunday precept is satisfied, or even whether Sunday Masses should be forbidden in some churches or oratories to promote the so called "parish Mass."[3] Nowadays, no one doubts the right of the faithful to fulfill the Sunday precept by attending Mass on Sundays in any church or oratory, and even in exceptional circumstances in some other proper place (cf. GIRM, 20).

Logically, the authority of the Church continues to warn against the abuses and "exclusivisms" that are always deplorable and contrary to the profound meaning of the celebration of the Eucharist.[4] Hence, the community or group of faithful for whose advantage the oratory is constructed, can perform in it all the ceremonies that the liturgy allows, taking into account the exceptions provided. Regarding the rest of the faithful that are allowed to enter the oratory with the consent of the superior, the norms for worship issued by the diocesan bishop should be observed whenever their attendance to the acts of worship celebrated in the oratory is not merely sporadic.

1. Cf. J. MANZANARES, "In schema de locis et temporibus sacris deque cultu divino animadversiones et vota," in *Periodica de re morali, canonica, liturgica* 68 (1979), p. 155.

2. Cf., e.g., cc. 857–859 regarding the place for baptisms; cc. 932–964 dedicated to the Eucharist; and cc. 1011, 1118, 1179 for the other sacraments.

3. Cf. P. HUIZING, "De auctoritate Ordinarii Loci relate ad rectores ecclesiarum non paroecialium et oratorium," in *Periodica de re morali, canonica, liturgica* 44 (1955), pp.175–195.

4. Cf. *Notitiae* 26 (1990), p. 145; cf. also CBS, "Instrucción pastoral sobre el sentido evangelizador del domingo y de las fiestas," in *Notitiae* 28 (1992), p. 607; *DPMB*, 85.

1226 **Nomine sacelli privati intellegitur locus divino cultui, in commodum unius vel plurium personarum physicarum, de licentia Ordinarii loci destinatus.**

The term private chapel means a place which, by permission of the local Ordinary, is set aside for divine worship, for the convenience of one or more individuals.

SOURCES: cc. 1188 § 2,3°; 1190; SCDS Instr. *Quam plurimum*, 1 oct. 1949, 1–19 (*AAS* 41 [1949] 493–501)

1227 **Canon Episcopi sacellum privatum sibi constituere possunt, quod iisdem iuribus ac oratorium gaudet.**

Bishops can set up for their own use a private chapel which enjoys the same rights as an oratory.

SOURCES: c. 1189; *PM* II, 5

1228 **Firmo praescripto can. 1227, ad Missam aliasve sacras celebrationes in aliquo sacello privato peragendas requiritur Ordinarii loci licentia.**

Without prejudice to the provision of can. 1227, the permission of the local Ordinary is required for Mass and other sacred celebrations to take place in any private chapel.

SOURCES: cc. 1194, 119:

CROSS REFERENCES: —

COMMENTARY

Ernesto Peñacoba

1. *Notion of a private chapel*

As restricted places assigned to worship, the origin of chapels is entangled with that of oratories (see commentary on c. 1223). In the strictest

sense provided by c. 1226, the first private chapels were founded in the palaces of the emperors in Constantinople during the age of Constantine. The private chapels of some of the popes and some bishops are also famous, such as the one of the Archbishop of Ravenna. Following the example of these great figures, the nobility soon began to construct private chapels too, thus facilitating for the Christians in their realms and domains the fulfillment of their religious duties. In many cases, with the passing of time, these chapels became rural parishes.[1]

The term *private chapel* includes what used to be known as *private oratories*, on which there is an extensive bibliography due most of all to the inexhaustible casuistry that their existence has generated.[2] Nowadays, all this complex legislation has been simplified. It was even suggested that the distinction between oratories and chapels be suppressed because it was considered to be a grammatical distinction. But the consultors decided to maintain this distinction, since even though these terms are conventional, they still have a solid, objective base.[3] Private chapels are defined, as it is also the case with oratories, as a place assigned for divine worship. Consequently, they are assigned to divine worship in the precise sense provided by c. 834, even though this is for the benefit of specific individuals. Indeed, their use is more restricted than that of the oratories, since they are constituted for the exclusive use of one or more physical persons somehow determined, whereas oratories are constructed for the benefit of an indeterminate number of the faithful, due to the fact that they belong to a group or community. Although the canon does not explicitly say so, it is implied that other people can *de facto* enter chapels, as is the case with oratories.

The permission of the ordinary is required for constructing a private chapel, in this case the local ordinary (cf. c. 134 § 2). Previously, the permission to construct private oratories belonged to the Sacred Congregation for the Discipline of the Sacraments. The experts paid special attention to this aspect, in part due to the abuses regarding this matter that have periodically taken place throughout the years.

The legislation has also been simplified where the permission of the ordinary is concerned in comparison with the *CIC*/1917. Both the granting of the permission for the construction of the chapel, and for the ability to celebrate the Holy Mass and other sacred functions are left up to the ordinary (c. 1228).

1. Cf. "Capilla," in *Enciclopedia Universal Ilustrada*, t. XI (Espasa, Barcelona), p. 482–483.
2. Cf. *Razón y Fe* 41–44 (1915–1916), for a lengthy study under the general title "Sobre oratorios y altar portátil" which gives interesting information on the historical development of this issue up to this century.
3. Cf. *Comm.* 12 (1980), p. 339.

2. *Private chapels of bishops*

The chapels that bishops and cardinals are allowed to have constitute a special case (c. 1227). We know that the pope already had a private chapel in the fourth century in the Lateran palace. Bishops enjoyed the faculty of private chapels from a very early time. Nothing is said in the text about cardinals since they need to become bishops first (cf. c. 351 § 1). In the process of writing these canons, and probably aiming at simplifying them, it was proposed that these chapels "eodem iure quo oratoria reguntur." The expression "sibi constituere possunt" was added to avoid an erroneous interpretation, such as believing that bishops need the permission of ordinaries (c. 1223).[4]

3. *Liturgical prescriptions*

Unlike oratories (see commentary on c. 1225), the constitution of a chapel does not entail the right to celebrate public acts of worship in it. The Mass and other sacred celebrations that can take place in chapels must be authorized by the local ordinary. Logically, the permission to perform these celebrations can be included in the permission for the construction of the chapel, granted separately in a general manner, or *ad casum*. It is assumed that this permission can be granted orally since nothing is specifically said about the method, although the general recommendation is to grant it in writing (regarding the preservation of the Blessed Sacrament in private chapels, cf. c. 934).

4. Cf. *Comm.* 12 (1980), p. 340.

1229 Oratoria et sacella privata benedici convenit secundum ritum in libris liturgicis praescriptum; debent autem esse divino tantum cultui reservata et ab omnibus domesticis usibus libera.

It is appropriate that oratories and private chapels be blessed according to the rite prescribed in the liturgical books. They must, however, be reserved for divine worship only and be freed from all domestic use.

SOURCES: c. 1196; RDCA ch. V, 1

CROSS REFERENCES: —

COMMENTARY

Ernesto Peñacoba

1. *Blessings of oratories and chapels*

Following the same tendency toward simplification and clarifications, oratories and chapels, unlike churches, can only be blessed. Churches are dedicated or blessed. Each possibility depends on the stability of the building, as the Rite of Dedication of a Church and an Altar, II, 1–2 suggests (also in the *Ceremoniale Episcoporum*, 864–865). The reason may be that churches are defined as buildings (*aedes*), and oratories and chapels as places (*locus*); it is evident that in the first case, a certain degree of stability is presupposed, whereas in the second case a less permanent character is suggested. Previously, public oratories were able to be consecrated—dedicated, in current terminology—like churches.

The blessing is what transforms an oratory or chapel into a sacred place. It is not the permission for its construction that provides oratories and chapels with this character, although, by virtue of the permission, they are already places assigned to divine worship.

The norm indicates that it is appropriate that these places be blessed. This is how it avoids going into details, such as the conditions that they should meet to be blessed, that are characteristic of strictly liturgical laws, since there is a wide range of circumstances in which a permission can be granted for these places of worship. On the other hand, the term *convenit* seems to be informed by another norm (c. 932) that requires that the Holy Mass be celebrated in a sacred place, unless, in a specific case, it is necessary to act differently. This is also to a certain extent a novelty, since the old c. 1196 did not allow for the blessing of domestic oratories.

2. *Faculty for blessing oratories and chapels*

The principle provided in c. 1207 should be applied regarding the faculty to bless oratories and chapels. In other words, it is the competence of the ordinary within his jurisdiction. Accordingly, this faculty is enjoyed by those who govern with ordinary and proper power even if they do not have episcopal character. This is a faculty that can be delegated in a general manner on a presbyter, without a special mandate.

3. *Regarding "communicatio in sacris" in oratories and chapels*

Although both oratories and chapels are not sacred places by virtue of their construction, it seems reasonable to presume that, due to the fact that they are assigned for divine worship, they must comply with the general norms concerning *communicatio in sacris* (*OE* 26–28), and even more so if they are sacred places because they have been blessed.

The *CIC* provides the general system of the *communicatio in sacris* in c. 844, regulating the participation in the liturgical cult or in the administration of the sacraments, of people belonging to different Christian denominations that are not in full communion with the Catholic Church. Nothing is expressly said about the participation of non-Catholic ministers or the celebration of non-Catholic ceremonies in Catholic sacred places. But it is implied that when the conditions indicated in c. 844 are met, a non-Catholic Christian can participate depending on the case in certain ceremonies (i.e., the sacrament of penance or the Eucharist in the case of Eastern Rite non-Catholics) in sacred Catholic places. More explicit norms on this matter can be found in DE/1967, 61 and DE/1993, 122ff.

CAPUT III
De sanctuariis

CHAPTER III
Shrines

1230 **Sanctuarii nomine intelleguntur ecclesia vel alius locus sacer ad quos, ob peculiarem pietatis causam, fideles frequentes, approbante Ordinario loci, peregrinantur.**

The term *shrine* means a church or other sacred place which, with the approval of the local Ordinary, is by reason of special devotion frequented by the faithful as pilgrims.

SOURCES: SCCouncil Decr. *Inter publicas,* 11 feb. 1936 (*AAS* 28 [1936] 167–168); SCS Resp., 8 feb. 1956

CROSS REFERENCES: cc. 1205, 1214

COMMENTARY

José T. Martín de Agar

Shrines constitute a reality in the life of the Church that has its origins in popular piety, the specific, juridical treatment of which had been requested by some authors, most of all Italian ones.[1]

The five canons that are devoted to shrines are a novelty of the *CIC*[2] and constitute a principle of unitary regulation, a general, juridical framework within which factual and juridical cases will be able to be included.

1. Cf., in addition to the various dictionaries, D. STAFFA, "De notione sanctuarii et de ipsius obligatione solvendi tributum pro seminario," in *Apollinaris* 49 (1976), pp. 251–258; G. FERROGLIO, "Note sulla definizione giuridica dei santuari," in *Studi in onore di F. Scaduto,* I (Milan 1936), pp. 383–388. A.C. JEMOLO, "I Santuari," in *Rivista di Diritto pubblico e della Pubblica Amministrazione* 1913/II, pp. 494–533.
2. Cf. *Comm.* 4 (1972), pp. 165–166; 12 (1980), p. 341; X. BROSSA, *Régimen jurídico de los santuarios en el CIC* (Rome 1996).

In the *CIC*, the places of worship are three: churches, oratories, and chapels; and this is so because shrines, in as much as they are places of worship, do not differ from any of these three, mainly from churches. The Code has not created a new kind of sacred place, but has intended to provide a juridical channel to a reality that is as old and diverse as that of the innumerable places where pilgrims, for one reason or another, gather, whose specific pastoral care must be provided for.

Indeed, if we compare the subject matter that the canons devoted to shrines deal with, we will soon notice that the interest of the legislator is very different in each case. Nothing is said about their construction or installation, nor of the ceremonies that can be performed in them or the use that they should be given: in all these matters, they comply with the norms referring to churches or other places of worship (cf. cc. 1214–1229).[3] What interests the legislator about shrines are other matters, as can be inferred from the canons that follow.

This canon provides a definition of shrine that, taking into account the limitations that any legal definition presents, intends to delimit juridically the phenomenon of the shrines . This is a broad definition, all encompassing, which at the same time indicates facts and conditions that should take place so that a place that is *de facto* the destination of pilgrimages can be *legally* considered a shrine.[4]

First, it should be a sacred place, normally a church. It often happens that a shrines may have been a hermitage originally and then, as the number of faithful that visited it increased, it has been expanded into a major church; but this is not the only possibility. In any case, what we are trying to say is that no matter what caused the pilgrimage of the faithful, a shrine is constituted by a church or a sacred place built there where pilgrims find spiritual aid, independently of whether there are other facilities associated with it: museum, the house where a saint was born or lived, a hospital, etc. As long as there is not a sacred place to worship and the pilgrims are spiritually taken care of, we cannot consider it to be a shrine properly speaking.[5] Logically, nothing can prevent pilgrims from visiting, for any pious cause, a church or an oratory that is not, juridically speaking, a shrine.

The feature characteristic of shrines is that the faithful go to it in pilgrimage attracted by a specific object of piety. This is what distinguishes them from other places of worship. The reasons why the faithful go on

3. Cf. P. CIPROTTI, "Santuari" in *Enciclopedia Giuridica* XXVII (Rome 1991), p. 1.

4. Cf. *Comm.* 12 (1980), p. 342. For a brief history of this definition and how it differs from that proposed by Staffa ("De notione...," cit., p. 256), cf. C. ROSELL, "Santuarios y Basílicas en el Derecho canónico vigente," in *Efemerides Mexicana* 6 (1988), pp. 157–170.

5. In a different sense, M. PETRONCELLI, "La disciplina dei luoghi sacri e la nuova classificazione degli edifici di culto," in *Vitam impendere vero. Studi in onore di Pio Ciprotti* (Vatican City 1986), p. 265.

pilgrimages to shrines are very diverse: miracles, apparitions or relics that enjoy popular veneration, granting of indulgences, etc.: each shrine has its own reason, which explains the large number of pilgrims.[6]

The authorization of the local ordinary has a double meaning: on the one hand, it means that he considers the specific facts that caused the commencement of the pilgrimages and the construction of the shrine (extraordinary phenomena, protagonists of these events, expressions of piety, etc.) in accordance with the faith and the life of the Church; but, besides the ecclesiastical approval, it also means integrating shrines into canon law, taking factual reality to the specific juridical channel provided by the law of the Church, as can be inferred from the following canons. From now on, shrines will be identified as such for juridical effects, most of all patrimonial. This puts an end to a legal loophole of the *CIC*/1917 that had resulted in problems, particularly in Italy where the absence of a juridical definition made it difficult to apply article 27 of the Lateran Concordat (February 11,1929),[7] still in force nowadays where the devolution of shrines in the Church is concerned.[8]

But, the fact that the *CIC* has otherwise organized the subject of shrines in a broad and flexible manner does not mean that it intends to construct *ex novo* the juridical situation of these places of worship, nor that the juridical statute that they had when the Code came into force should be considered abrogated (foundational laws, title ownerships, privileges, etc.): only those matters that are clearly incompatible with the current legislation should be considered as reformed by it, as is the case with any other subject, taking into account the general norms about acquired rights, usages, particular law, privileges, etc.

Normally, shrines originate as *acts* of popular piety, but the approval of the ordinary grants legitimacy to this reality.[9] In any case, this canon does not require the approval to be expressed in any particular way; it could initially be done tacitly; it is even sufficient if the ordinary does not oppose it. This is also the case when a new usage is introduced, since, at least in many cases, this is exactly what is taking place: pilgrims who visit a place are attracted for a pious reason. The canons that follow describe the juridical configuration of shrines more specifically.

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6. For a brief history of the Spanish shrines, cf. ALDEA-MARÍN Y VIVES, "Santuarios," in *Diccionario de historia eclesiástica de España*, IV (Madrid 1975), pp. 2205–2380.

7. Cf. R. JACUZIO, *Commento della nuova legislazione in materia ecclesiastica* (Turin 1932), pp. 141–145; P.G. CARON, "Le amministrazioni civili dei santuari e l'art. 27, ult. cpv., del Concordato lateranense," in *Il Diritto Ecclesiastico* 64 (1953/II), pp. 212–228; idem, "Santuario," in *Novissimo Digesto Italiano* XVI (Turin 1969), pp. 527–530; G. FELICIANI, "Santuario," in *Enciclopedia del Diritto* XLI (Varese 1989), pp. 300–302.

8. Cf. Legge May 20, 1985, no. 222, art. 73; F. FINOCCHIARO, "Enti centrali della Chiesa cattolica," in *Enciclopedia Giuridica* XII (Rome 1988), p. 3; F. FELICIANI, "Santuario," cit., p. 302; P. CIPROTTI, "Santuari," cit. p. 2.

9. Cf. *Comm.* 12 (1980), p. 342.

1231 **Ut sanctuarium dici possit nationale, accedere debet approbatio Episcoporum conferentiae; ut dici possit internationale, requiritur approbatio Sanctae Sedis.**

For a shrine to be described as national, the approval of the Bishops' Conference is necessary. For it to be described as international, the approval of the Holy See is required.

SOURCES: —

CROSS REFERENCES: cc. 312, 322, 1232

COMMENTARY

José T. Martín de Agar

This canon provides a juridical classification of *diocesan, national,* and *international* shrines. The diocesan ones are not explicitly mentioned (c. 1232 does mention them), to convey the idea that all sanctuaries that are neither national nor international are diocesan ones, leaving no room in this classification for a fourth kind of sanctuary that does not belong to any of these categories.[1] Therefore, the approval of the local ordinary to which c. 1230 refers is enough for the shrine to be referred to as diocesan. On the other hand, the approval of the Bishop's Conference and the Apostolic See will normally be explicit, since they will be granted in response to a request of the interested party, although one could imagine a different kind of situation.

The *CIC* does not provide the criteria to be taken into account to determine the category of the shrines. In my opinion, we should mainly consider the origin of the pilgrims, in other words the ambit of spiritual influence of the shrine, particularly in the case of shrines that already exist and that intend to obtain the title of national or international shrine (which they may already enjoy). Normally shrines are initially diocesan; they can then reach higher categories as long as they attract pilgrims of a more remote origin. But a shrine can also be national or international from the beginning, for example, when it is built with donations from faithful individuals from all over the country, or from several nations. In

1. In a previous draft mention was also made of *parochial* and *regional* shrines: cf. *Comm.* 4 (1972), pp. 165–166. Nevertheless, it is possible, as Feliciani affirms, that "a shrine can be called regional if it is declared by all bishops concerned" ("Santuario," in *Enciclopedia del Diritto* XLI (Varese 1989), p. 301).

any case, what is juridically relevant as far as the diocesan, national, and international titles are concerned is the approval that the corresponding ecclesiastical authority grants, since the canon does not demand that any other requirements be met.

It is the responsibility of the title owners of the shrine to request its classification as diocesan, national, or international, alleging the reasons that back up their request. It does not seem possible that the authority can make this classification of his own accord without the consent of the title owner of the shrine, since it is clear that the canon refers to approval, which entails a request of the proprietors. On the other hand, the authority can cause the revocation of the approval after it is granted when there are enough reasons for it, for example if the influence of the shrine decreases, or if it stops fulfilling the specific requirements by virtue of which it was granted the ability to call itself national or international.

Regardless of the fact that the term *diocesan, national,* or *international* can be catalogued as a title, category or class, or otherwise, the important thing is that the approval granted by the proper authority has certain juridical effects as it is implied in c. 1232.[2]

On the other hand, the local ordinary, the Bishop's Conference or the Holy See can grant the corresponding approval when certain requirements or conditions that permanently affect the juridical status of the sanctuary are met. It is precisely because the classification of a shrine has juridical consequences that the administrative act of its approval—or its refusal—can be appealed by those who consider themselves affected by it (title owner of the shrine, other ecclesiastical authorities, etc.).

The necessary approval for a shrine to be called *national* is the competence of the bishops' conference. Some of them have legislated about the exercise of this competence. More specifically, the Chilean Conference has provided that the procedures to follow for the approval of a national shrine and its statutes should be the same ones needed for the approval or establishment of national associations, and that the request should be made or approved by the bishop of the diocese where the shrine is located.[3] The Ecuador Conference requires the shrine to be the destination of pilgrimages for at least twenty-five years, during which time and up to the present moment the devout should have been taken care of appropriately, being faithful to the doctrine and decorum in the liturgy. The Philippine Conference provides different reasons that make it possible to approve the national status of a shrine. The Italian Conference has decided that its competences on the issue of shrines be exercised by the

2. To the contrary, C. ROSELL, "Santuarios y Basílicas en el Derecho canónico vigente," in *Efemerides Mexicana* 6 (1988), pp. 176–177.

3. For the text of the provisions of the bishops' conferences to which we make reference, cf. J. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali complementare al CIC* (Milan 1990).

permanent commission based on the instruction handled by the presidency. The Bishops' Conference of Mexico has directly named the Basilica of Our Lady of Guadalupe in the Tepeyac national shrine and has established a commission to "carry out this nomination."

The approval of the *international* status of a shrine is the responsibility of the Holy See, which exercises this competence through the *Casti connubii* (*PB* 97, 1°); no international shrine has been approved yet, although some may be considered *de facto* to be such: the congregation desires that the request be made through the bishops' conference and that it include the statutes referred to by the following canon.

1232 **§ 1. Ad approbanda statuta sanctuarii dioecesani, competens est Ordinarius loci; ad statuta sanctuarii nationalis, Episcoporum conferentia; ad statuta sanctuarii internationalis, sola Sancta Sedes.**

§ 2. In statutis determinentur praesertim finis, auctoritas rectoris, dominium et administratio bonorum.

§ 1. The local Ordinary is competent to approve the statutes of a diocesan shrine; the Bishops' Conference, those of a national shrine; the Holy See alone, those of an international shrine.

§ 2. The statutes of a shrine are to determine principally its purpose, the authority of the rector, and the ownership and administration of its property.

SOURCES: *SCCong* Decr. *Pompeiana Praelatura,* 21 mar. 1942 (*AAS* 34 [1942] 203–204); PAULUS PP. VI, Const. *Laurentanae Almae,* 24 iun. 1965 (*AAS* 58 [1966] 265–268); SCR Resp., 18 iun. 1966; PAULUS PP. VI, m. p. *Inclita toto,* 8 aug. 1969 (*AAS* 61 [1969] 533–535)

CROSS REFERENCES: cc. 94, 117, 1213, 1256, 1257

COMMENTARY

José T. Martín de Agar

The canon logically refers to the canonical statutes of the shrines, in other words, those aspects of their constitution and activity regulated and warded by the law_of the Church. Some of these aspects, particularly those related to temporary goods, can be governed by civil law, when the shrine is not and does not belong to an ecclesiastical juridical person; certainly where worship and the pastoral is concerned, shrines are always subject to canonical discipline: these aspects can be developed normatively into a series of statutes.

But the canon does not intrinsically provide that all shrines should have their own statutes; in fact, the proposal of one of the consultors of the revision Commission to request "obligatio pro omnibus sanctuariis habendi propria statuta" was rejected.[1] In any case, the interest of the legislator in clarifying and providing a specific channel to such an important

1. Comm. 12 (1980), p. 343. To the contrary, M. PETRONCELLI, "La disciplina dei luoghi sacri e la nuova classificazione degli edifici di culto," in *Vitam impendere vero. Studi in onore di Pio Ciprotti* (Vatican City 1986), p. 266; H. REHINHARDT, "Geweihte Stätten," in *Handbuch des katholischen Kirchenrechts* (Regensburg 1983), p. 651.

reality as that of the shrines implies that it would be convenient for them to have statutes, which would function as an instrument to safeguard the identity and mission of each one of them.

What the canon does establish is who is the proper authority to approve the statutes of a shrine, in the case that it has any: the local ordinary, if we are dealing with a diocesan shrine, the bishop's conference if it is a national one, and the Holy See if it is an international one; in other words, the same authority that approves the denomination of the shrine according to c. 1231.

Thus, when the ordinary, the bishop's conference, or the Holy See approves that a shrine be called diocesan, national, or international, they are simultaneously taking upon themselves the administrative competence to approve the statutes in which the juridical system for each shrine is specified within the framework of the general normative.

The fact that a shrine may have statutes does not necessarily entail that it is constituted as a juridical person. Some shrines have a personality,[2] and in this case they should have statutes according to c. 117; others may depend on a physical or juridical (civil or canonical) person. In any case, the existence of statutes indicates the presence of a differentiated subject whose ability and autonomy will be determined by them.[3]

The writing of the statutes is the responsibility of the subject who is the title owner of the shrine. One of the first draftings of this canon started with *Ad condenda statuta...*,[4] but the *Schema* of 1980 (c. 1183) already uses the following phrasing: *Ad approbanda statuta...*, circumscribing the competence of the authority to approving or not approving the statutes with which they are presented. In any case, the requirement of the approval implies a certain administrative dependence of the authority, which will be expressed in the statutes of the shrine.

The approval of the statutes is an administrative act of control that intends to guarantee the obedience of the ecclesiastical discipline in the life and activity of the shrine. Whoever is responsible for granting this approval may demand that certain requirements or conditions be met before doing so, in order to secure the respect of the law and to specify the relationships between the shrine and the authority in the long run. But such requirements should not limit arbitrarily the legitimate autonomy of the shrine nor of its proprietors, nor subject it to unjust levying; and the act of approval does not mean that the shrine becomes a property of the diocese,

2. Feliciani affirms that in this case the shrine should be constituted as a public juridical non-collegial person in virtue of cc. 115 and 116 ("Santuario" in *Enciclopedia del Diritto* XLI (Varese 1989), p. 302).

3. Petroncelli, on the contrary, is of the opinion that every shrine should have it own statutes, the approval of which automatically makes the shrine an ecclesiastical person, if it had not been so previously ("La disciplina dei luoghi...," cit., p. 266).

4. *Schema canonum Libri IV de Ecclesiae munere sanctificandi Pars II* (Typis polyglottis Vaticanis 1977), c. 26.

the bishops' conference, or the Holy See. In all, it seems that subjecting the shrine to the authority that approves it will generally be similar to that of the juridical person, either national or international, diocesan associations, and more specifically that which is provided by the statutes.

On the other hand, the diocesan bishop has the same rights and duties over the shrines located in his diocese, independent of whether they are national or international, that he has over the other places of worship and institutions that are and act within his jurisdiction, in as much as he is responsible for guaranteeing order and discipline, and for organizing worship, the pastoral and the apostolate (cf., i.e., cc. 381 § 1, 386, 391, 392, 394, 397). The national or international character of a shrine does not entail exemption from the local authority. This is not the case where privileges or exemptions granted to the shrine by someone that has the power to do so are concerned.[5]

The great variety of existing shrines will find in statutory law an appropriate channel of expression and safeguard. It should be taken into account that a hermitage belonging to a family, or a rectoral, parish, or cathedral house, or one that is attached to a religious house, or that belongs to a municipality, brotherhood, etc. can be called shrines. In view of all this, the content of the statutes will be equally varied and diverse. It should also be taken into account that shrines had in most cases a defined juridical situation even before the *CIC*, that cannot be considered to be extinguished as if everything should be constituted *ex novo* once the statutes are written.[6] Rather, the objective is to reflect this situation in them, clarifying whatever is necessary to clarify and perhaps specifying what the law requires from shrines, particularly where pastoral care of pilgrims and the matters referred to in § 2 of the canon are concerned: "its purpose, the authority of the rector, and the ownership and administration of its property." On these matters, the legislator desires that the clarity required for good order and juridical safety be present.

As far as the *purpose* is concerned, we should say that the purpose of any shrine, in as much as it is a sacred place, is to promote worship, piety, and the spiritual benefit of the faithful, and that the means for this are essentially the same: the liturgy, especially the celebration of the mass and of the other sacraments, and the preaching of the Gospel. This is why I

5. E.g., the *pontifical* shrine (Loretto, Pompeii, Assisi, St. Anthony of Padua) which fall under the jurisdiction of the diocesan bishop but directed by a pontifical delegate (cf. Pius XI, Ap. Const. *Iam annus elapsus*, June 13, 1933: *AAS* 25 (1933), pp. 325–328; idem, Ap. Const. *Lauretanae Basilicae,* September 15, 1934: *AAS* 26 (1934), pp. 578–579; Pius XII, Decr. *Pompeiana Praelatura*, March 21, 1942: *AAS* 34 (1942), pp. 203–204; PAUL VI, Ap. Const. *Lauretanae Almae*, June 20, 1965: *AAS* 58 (1966), pp. 265–268; idem, m.p. *Inclita toto*, August 8, 1969: *AAS* 61 (1969), pp. 553–555.

6. Feliciani observes that a shrine can become "already sufficiently disciplined in its activities by the norms of universal and particular law inasmuch as a church of a diocese, parish, religious institute, or other natural entity, ecclesiastical or not."("Santuario," cit., p. 301).

think that the intention here is to determine the *peculiar motive of piety* that attracts pilgrims, the ways in which such devotion can be promoted, and, through it, the worship and the edification of the faithful. This will also serve the purpose of safeguarding the identity and characteristics of each shrine.[7]

As far as the *rector* is concerned, we think that the method of designation and appointment, his faculties, and the bonds to which he is subject in the different aspects of his office (toward the diocesan bishop, the title owners of the shrine, the parish priest, the religious superior, etc.) should be determined. Logically, this matter should be determined in the statutes taking into account the general and particular laws concerning the parish priests, rectors of churches, religious institutes, etc., depending on the kind of shrine.

Concerning the *property*, the situations can also be very different. We could certainly distinguish between those cases where the shrine is a juridical person and those in which it is not, but as we all know, persons (physical or juridical) are not the only subjects of rights and duties; we have already seen that the fact that a shrine has its own statutes indicates that we are dealing with a specific and identifiable institution capable of juridical title ownerships. This is why it is convenient to determine clearly the patrimony of the shrine, distinguishing it from that of other institutions or subjects that may be related to it (parish, religious house, associations of the faithful, etc.), and the ends to which the economical resources will be assigned should also be determined.

Regarding the title ownership of the property, this corresponds to the shrine itself, either completely if it is a juridical person, or as patrimony separated from the title owner of the shrine. The same can be said about its administration: it is initially the responsibility of the organs of the shrine, with more or less autonomy depending on the dependence or independence that it enjoys with respect to other subjects. This issues are precisely what the statutes should clearly determine.

The properties of the shrine are ecclesiastical goods when the shrine is a public, ecclesiastical person, or when, not having its own legal status, it belongs to a public, ecclesiastical person. In this cases, the shrine should comply with the canons in book V. If the shrine has a private, canonical, legal status or it belongs to an individual within this category, its property is not ecclesiastical, and it should follow the statutes that comply with c. 1257 § 2, but the ecclesiastical authority has the duty and the right to watch them so that it is used appropriately for the purposes of the shrine.

If the shrine is or belongs to a merely civil institution or to a physical person, its property is logically secular and should comply with civil law. In any case, since the shrine is a sacred place with cultic and religious purposes, the ecclesiastical authority is responsible for requiring the

7. Cf. *Comm.* 12 (1980), p. 343.

fulfillment of the discipline concerning sacred places (cf. c. 1213), to organize the pastoral activity and to watch over the correct use of the offerings and alms. Otherwise, the ecclesiastical authority will not grant the approval of c. 1230, not that of the statutes, and he could withdraw them "even publicly."

In the same way that some bishops' conferences have provided procedures or requirements for the designation of the national shrines, some bishops' conferences have provided procedures and requirements for the approval of the statutes. Thus, the Chilean Conference, besides indicating the procedure (see commentary on c. 1231), requires that "the statutes, besides providing the specifications indicated in c. 1232 § 2, should clearly say that the authority of the pastoral task of the shrine is that of local ordinary." The Ecuadorian Bishops' Conference will submit any statutes presented to it to an *ad hoc* commission, and if the latter approves them, they will be submitted for approval to the general assembly. The Philippine Conference provides the requirements that national shrines should meet; these requirements are very similar to the ones that a church should meet to receive the title of *minor basilica*: dignity in the liturgy, *schola cantorum*, a sufficient number of priests, etc.[8]

8. Cf. SCRit, Decr. *Domus Dei decorem*, June 6, 1968: *AAS* 60 (1968), pp. 536–539; *EV* 3/456–460; Norms of the SCSCD, *Ecclesia congruenti*, August 15, 1975, in *Notitiae* 11 (1975), pp. 260–262; *EV* S1/572–584.

1233 **Sanctuariis quaedam privilegia concedi poterunt, quoties locorum circumstantiae, peregrinantium frequentia et praesertim fidelium bonum id suadere videantur.**

Certain privileges may be granted to shrines when the local circumstances, the number of pilgrims and especially the good of the faithful would seem to make this advisable.

SOURCES: SCCouncil Facul., 8 feb. 1940; SCRit Rescr., 9 feb. 1967 (*AAS* 59 [1967] 181–182); *SCCong Directorium quoad turismum*, 30 apr. 1969, II, B, d

CROSS REFERENCES: cc. 76ff.

COMMENTARY

José T. Martín de Agar

The circumstances that surround the pastoral activity of the shrines are normally particular, and present a singular opportunity for the spiritual renewal of the pilgrims by participating in the liturgy, listening to preaching, and receiving the daily sacraments. In order to make the pastoral care of the pilgrims more efficient, and keeping in mind the welfare of the souls, it may be convenient to grant the shrines certain privileges. These can be of a liturgical character (i.e., the celebration of certain feasts and commemorations in a more solemn way, or the perpetual exposition of the Blessed Sacrament), the absolution of reserved sins, indulgences, pecuniary exemptions, etc.

Although the canon refers to privileges, I think that in practice this could be concessions, dispensations, permissions, etc., granted to the shrine, the rector, or the priests who take care of it or who are just passing though, or to the pilgrims, according to the general norms that govern these kinds of acts and the matter to which they may refer. In the *Schema* of 1977 (c. 25 § 2), the term *exemptions* was used rather than privileges.

Many shrines enjoy several privileges and graces from a very early time; the statutes that are eventually written in accordance with c. 1232 can also be used to confirm their interest, usefulness, or validity, to clear up doubts, avoid lawsuits, and clarify as much as possible this matter that is sometimes very complicated.[1]

1. Cf. *Sentencia* of the Signatura, c. Stickler, September 29, 1989, in *Revista Española de Derecho Canónico* 48 (1981), pp. 307–319.

The facts that can justify the granting of privileges to shrines are very diverse; some examples are geographical distances, the large gatherings of pilgrims, the influence and relationship of the shrine to the life and history of a region, etc. In any case, the concession must respond above all to the good of the devout faithful, so that they may obtain the greatest good from their visit to these places of worship and prayer.

1234 **§ 1. In sanctuariis abundantius fidelibus suppeditentur media salutis, verbum Dei sedulo annuntiando, vitam liturgicam praesertim per Eucharistiae et paenitentiae celebrationem apte fovendo, necnon probatas pietatis popularis formas colendo.**

§ 2. Votiva artis popularis et pietatis documenta in sanctuariis aut locis adiacentibus spectabilia serventur atque secure custodiantur.

§ 1. At shrines the means of salvation are to be more abundantly made available to the faithful: by sedulous proclamation of the word of God, by suitable encouragement of liturgical life, especially by the celebration of the Eucharist and penance, and by the fostering of approved forms of popular devotion.

§ 2. In shrines or in places adjacent to them, votive offerings of popular art and devotion are to be displayed and carefully safeguarded.

SOURCES: § 1: SCCouncil Decr. *Inter publicas*, 11 feb. 1936 (*AAS* 28 [1936] 167–168); PAULUS PP VI, Const. *Laurentanae Almae*, 24 iun. 1965 (*AAS* 58 [1966] 266); *DPMB* 90b, 180
§ 2: *SC* 124; PAULUS PP. VI, Const. *Laurentanae Almae*, 24 iun. 1965 (*AAS* 58 [1966] 266); *SCCong* Litt. circ., 11 apr. 1971, 6 (*AAS* 63 [1971] 317)

CROSS REFERENCES: cc. 213, 1292 § 2

COMMENTARY

José T. Martín de Agar

The legislator wanted to underline the eminently pastoral purpose of shrines, although it would have been enough considering them places of worship. Apart from the other motives of interest (artistic, historical, etc.), the Church wants the faithful to find there an atmosphere and a pastoral care that helps them to come closer to God and to improve their Christian life; this should be the main purpose of those to whom a shrine is entrusted.

The life of a shrine must be structured around divine worship and prayer: celebration of the holy sacrifice, administration of the sacrament of penance, preaching, pious exercises and practices of popular piety that have been approved (c. 839).

Frequently dispensing the means of salvation to the faithful that gather constitutes, somehow, the most important duty of the shrine (cf. c. 213) and justifies the privileges which it can be granted. For this

reason, the order of cc. 1233 and 1234 could be inverted: the appropriate pastoral care of the pilgrims (c. 1234) is the main reason for the concessions made to the shrine (c. 1233).

The duty of the shrines should be adjusted to the proper character of each shrine and to the needs of the pilgrims, such as linguistic differences, needs of a group, etc. Naturally, the means are the usual ones, those that the Lord entrusted to his Church: prayer, preaching, the sacraments. The special characteristic of shrines resides in the possibility of receiving them in the most beneficial way, so that they become a driving force of Christian life, aimed at subsisting beyond the life of everyone, and that the shrine be a source of spiritual irradiation and a reference point for other churches and communities of the faithful.

Special attention will be paid to the dignity and splendor of liturgical celebrations, especially the Eucharist, and frequent and conscientious preaching. Since the pilgrimage always has a penitential character, the possibility of receiving the sacrament of penance should be made available to the faithful by providing an abundance of confessors at suitable times; c. 961 warns us that the gathering of many pilgrims does not in itself justify the granting of general absolution, so the moments of greater influx of pilgrims should be foreseen in order to avoid pilgrims missing the opportunity to confess and be personally absolved.[1]

Certain bishops' conferences, like the ones from Ecuador and the Philippines, have precisely subordinated the approval of the national status of a shrine to the care of worship, fidelity to the doctrine, and making the sacrament of penance available.

The Holy See takes care of the duty of the shrines by means of the *Pontifical Council of the Pastoral Care of Migrants and Itinerant People*, which on May 5, 1999 published the document "The Shrine—Memory, Presence and Prophecy of the Living God." (cf. *PB* 149–151).[2]

Finally, c. 1234 provides that votive art be displayed where they can be seen by the pilgrims and that they be looked after properly, either in the church of the shrine, or in any other facility. These objects, although they are not necessarily precious, should not be thrown away because they are tokens of gratitude and a manifestation of popular art and piety. A permission from the Holy See is required for their valid disposal (c. 1292 § 2).[3]

1. Cf. *Relatio complectens...* (Typis polyglottis Vaticanis 1981), p. 275.
2. On the importance and pastoral role of shrines, cf. Enc. *Redemptoris Mater*, no. 28; SCSDW, *Collectio missarum de beata Maria virgine*, August 15, 1986, *Praenotanda*, nos. 29–33, in *Notitiae* 22 (1986), pp. 907–925 (*EV* 10/764–768); idem, *Orientamenti e proposte per la celebrazione dell'anno mariano*, April 3, 1987, nos. 73–94, in *Notitiae* 23 (1987), pp. 342–396 (*EV* 10/1519–1550).
3. Regarding security measures to protect precious goods, cf. *Circular* of the SCC *Opera artis* of April 11, 1971, in *EV*/4, 655–664.

CAPUT IV
De altaribus

CHAPTER IV
Altars

1235 **§ 1. Altare, seu mensa super quam Sacrificium eucharisticum celebratur, fixum dicitur, si ita exstruatur ut cum pavimento cohaereat ideoque amoveri nequeat; mobile vero, si transferri possit.**

§ 2. Expedit in omni ecclesia altare fixum inesse; ceteris vero in locis, sacris celebrationibus destinatis, altare fixum vel mobile.

§ 1. The altar or table on which the eucharistic Sacrifice is celebrated is termed fixed if it is so constructed that it is attached to the floor and therefore cannot be moved; it is termed movable, if it can be removed.

§ 2. It is proper that in every church there should be a fixed altar. In other places which are intended for sacred celebrations, the altar may be either fixed or movable.

SOURCES: § 1: c. 1197 § 1; *EMys* 24; GIRM 259–261, 264; RDCA ch. IV, 3, 6
§ 2: c. 1197 § 2; GIRM 262; RDCA ch. IV, 6

CROSS REFERENCES: cc. 897, 899, 1214, 1236, 1237

COMMENTARY

Rudolf Schunck

1. The *CIC* provides the norms concerning altars in cc. 1235 to 1239, a subject to which the *CIC*/1917 devoted cc. 1197–1202.

During the preparatory phase, the redactors of the *Schema* of 1977 did not believe it was necessary to preserve the regulation concerning altars in "Sacred Places and Times," with the intention of leaving out of the

CIC what pertained to this matter. During the session of January 31, 1980 session, however, when dealing with the possible gaps in the *Schema* of 1977, the Commission for the revision of the *CIC* believed it was fitting to introduce certain provisions concerning altars so as not to leave its regulation only to the liturgical books. One of the consultants prepared a draft of five canons that was used as the bases of the Commission's work. The content of the norms was mainly taken from the liturgical provisions that were in force at that time; more specifically, from the General Instruction of the Roman Missal and the Rite of Dedication of a Church and an Altar. In the session mentioned before, the Commission discussed the necessary modifications and decided what the definitive text of the canons should look like.[1]

2. Canon 1235 is divided into two paragraphs; the first one reproduces almost literally the no. 261 of the GIRM. In fact, the altar—a crucial element, which can be found in any religion and in the rites of all churches—is, in the Catholic Church, the place, the table on which the priest celebrates the eucharistic sacrifice. The previously mentioned draft that was used as the basis for the writing of this canon, referred to the "celebration of the Eucharist"; but in the session of January 31, 1980 the Commission decided to change the expression to the "celebration of the eucharistic Sacrifice." The priest renews on the altar the sacrifice of Jesus Christ's death in a bloodless manner. The altar is exclusively devoted to this end, since it is dedicated only to God. This is why it is forbidden to place on it images, pictures or relics of the saints for the veneration of the Christian people (cf. RDCA , IV, 10), or for the decoration of the altar (cf. GIRM, 268–270). The altar "is also the table of the Lord, to which God's people are called to participate in the Mass; it is also the center of actions of grace that takes place in the Eucharist" (cf. GIRM, 259).

Apart from providing a definition of the altar, the canon distinguishes two different kinds of altars: fixed or movable. The regulation of both altars differs from that provided by cc. 1197 § 1, 1° and 1198 § 2 of *CIC*/1917. The 1917 legislator stated that the fixed altar consisted of a stone table, in other words, the altar-table, which was fixed to the base of the altar (made of stone or brick) and also to the floor. The *CIC*, on the contrary, does not say anything about the base of the altar (cf. c. 1236 § 1); it does say, however, that the fixed altar should be attached to the floor so that, due to the way in which it is built, it cannot be moved.

The concept of the movable altar no longer refers to the "movable altar stone or sacred stone" (cf. c. 1197 § 1, 2° *CIC*/1917), but the table—made of "any solid material which is suitable for liturgical use" (c. 1236 § 2)—that is not fixed to the floor, which makes it possible to move it from one place to another.

1. Cf. *Comm.* 12 (1980), pp. 381–383.

3. Paragraph 2 establishes that there should be a fixed altar in each church. The liturgical prescriptions of no. 261 of the GIRM add that the main altar must be unobstructed and should be placed in such a way that it becomes the center of the temple. We should also take into account that the RDCA says that "only one altar should be constructed in the new churches, so that the fact that there is only one assembly of the faithful indicates the existence of only one Savior, Jesus Christ, and only one Church" (chap. IV, 7). This does not mean that there should not be other fixed or movable altars in other places dedicated to liturgical meetings (i.e., to the celebration of the eucharistic sacrifice during certain feasts or for small groups, or in the chapel where the Eucharist is reserved). The construction of altars that have a merely decorative purpose should be avoided (cf. RDCA , IV, 7). Finally, the altar must be unobstructed, so that the priest can move around it to celebrate the eucharistic sacrifice or any other liturgical act facing the people (cf. RDCA, IV, 8).

We should emphasize what the GIRM provides regarding the altar stone or consecrated stone. In its no. 265, unlike the *CIC*/1917, it says that neither the fixed altar nor the movable one need to have an altar stone.

(For legislation concerning the dedication or blessing, see the commentary on c. 1237[2]).

2. For the history of the altar, cf. J.A. ABAD IBÁÑEZ-M. GARRIDO BONAÑO O.S.B., *Iniciación a la liturgia de la Iglesia* (Madrid 1988), pp. 111–116.

1236 **§ 1. Iuxta traditum Ecclesiae morem mensa altaris fixi si lapidea, et quidem ex unico lapide naturali; attamen etiam alia material digna et solida, de iudicio Episcoporum conferentiae, adhiberi potest. Stipites vero seu basis ex qualibet materia confici possunt.**

§ 2. Altare mobile ex qualibet material solida, usui liturgico congruenti, exstrui potest.

§ 1. In accordance with the traditional practice of the Church, the table of a fixed altar is to be of stone, indeed of a single natural stone. However, even some other worthy and solid material may be used, if the Bishops' Conference so judges. The support or the base can be made from any material.

§ 2. A movable altar can be made of any solid material which is suitable for liturgical use.

SOURCES: § 1: c. 1198 §§ 1–3; SCRit Resp., October 17, 1931; SCRit Ind., November 7, 1951; GIRM 263; RDCA ch. IV, 9
§ 2: GIRM 264; RDCA ch. VI, 2

CROSS REFERENCES: c. 1235

COMMENTARY

Rudolf Schunck

1. The absence of temples in the early Church where Christians could celebrate the different religious functions, and, especially, the eucharistic sacrifice, prompted the common practice of using a wooden table—what we would nowadays call, using the Code's terminology, a movable altar—for the celebration of the Eucharist.

The oldest fixed altar that we know comes from Syria and dates from the third century. We also know that in Rome, up to the fourth century, deacons used to bring the altars with them (their main part was made of wood) for the celebration of each mass. The Synod of Epaon (517 A.D.) decided that from that moment on, no altar would be dedicated unless it were made of stone; this provision resulted in the proliferation of these kinds of altars—fixed and of stone. And although there is evidence of altars made of precious metals in later centuries, the old tradition of building them of stone, at least as far as the upper part is concerned, was preserved.

From the fourth century on, Christianity began to build its churches on the known graves of the martyrs as a way of expressing the great veneration and love that it felt for them. It often happened that, in such cases, the altar would be placed over the grave of a martyr. From this originated the belief that each altar should be built over the grave of a martyr, or at least a martyr's relic.

Number 263 of the GIRM establishes that in accordance with "the traditional usage of the Church and [with] its meaning, the table of the fixed altar should be made of stone; specifically of natural stone." This reference to the "meaning" aims to remind us that, in the Holy Scripture, Christ is also referred to as "rock" (cf., for instance, 1 Cor 10:4; Rom 9:33) or as "stone" (Christ "corner stone," cf., for instance, Mt 21:42 and Acts 4:11). Thus, we can easily understand the reason that has supported the use of stone for the construction of altars for many centuries; the altar is the symbol of Christ, and he is the "rock," the "corner stone."

2. According to the canon, the table of the fixed altar "is to be of stone, indeed of a single natural stone. However, even some other worthy and solid material may be used, if the Bishops' Conference so judges." Such a modification had already been provided before by the GIRM, 263, which literally says: "a different but appropriate, solid, and well crafted material can also be used." The Spanish Bishops' Conference has said that "according with the faculty acknowledged in c. 1236 § 1, the most preferred material for the table of the fixed altar is the natural stone; but natural wood can also be used, and even a concrete block when it is appropriately crafted."[1] The Austrian Bishops' Conference also allows for the use of other materials such as wood, artificial stone, and metal. The Swiss Bishops' Conference resolved to delegate to the ordinary the faculty of accepting the use of any appropriate material other than natural stone.[2] The German Bishops' Conference has not yet established any particular norms in this regard.

The *CIC*, unlike its specifications about the table, does not determine the material of which the columns or the base of the fixed altar should be made; "they can be made of any material," according to the canon. Canon 1198 § 2 of the *CIC*/1917 did specify that "the sides or little columns on which the table rests should be made of stone." Now, as we have said, one is free to choose the material of which the plinth is made, which does not authorize us, according to the norm, to use unworthy or inappropriate materials.

3. Movable altars were referred to in *CIC*/1917 (see commentary on c. 1235) as "movable altar stones" or sacred stone of one piece in which there should be enough room for the host and most of the chalice

1. II gen. Decr. of norms complementary to the CIC, in *BOCEE* 6 (1985), p. 63.
2. Cf. H. SCHMITZ-F. KALDE, *Partikularnormen der deutschsprachigen Bischofskonferenzen* (Metten 1990), p. 75.

(cf. c. 1198 § 3). A reliquary was sometimes placed within these sacred stones, which are in some cases very small. The altar stones should have been consecrated (c. 1199 *CIC*/1917).

The current regulation includes the norms of no. 264 of the GIRM. The movable altar can be made of any solid material that is appropriate for liturgical uses. The "diverse traditions and customs of people" should be taken into account according to this provision. We should also emphasize that movable altars are not fixed to the floor and relics can be placed at their base (cf. RDCA , VI, 11 and 32).

4. In accordance with the later liturgical regulations, the meaning of the altar as the table of the Lord, and its relationship to the relics of martyrs and saints has been stated in a clearer manner. The altar is preserved for the offering of Jesus Christ; he is the head of the Church, and only he offers himself on the altar by means of the priests who act "in persona Christi." The saints and martyrs are his already glorified members in heaven, and if relics are kept of them, these should be found under the fixed altars. According to these principles, the rite of the blessing of the altars (RDCA , IV, 48), does not foresee the placement of relics in it, nor does it establish the blessing of the sacred stone, but provides that the whole table of the altar be blessed.

1237 **§ 1. Altaria fixa dedicanda sunt, mobilia vero dedicanda aut benedicenda, iuxta ritus in liturgicis libris praescriptos.**

§ 2. Antiqua traditio Martyrum aliornmve Sanctorum reliquias sub altari fixo condendi servetur, iuxta normas in libris liturgicis traditas.

§ 1. Fixed altars are to be dedicated, movable ones either dedicated or blessed, according to the rites prescribed in the liturgical books.

§ 2. The ancient tradition of placing relics of Martyrs or of other Saints beneath a fixed altar is to be retained, in accordance with the norms prescribed in the liturgical books.

SOURCES: § 1: cc. 1197 § 1,1° et 2°; 1199 §§ 1–3; SCRit *Ritus... brevior consecrationis altaris immobilis...*, (*AAS* 12 [1920] 449); SCRit *Ritus... brevior in consecratione altarium...* (*AAS* 12 [1920] 450–453); GIRM 265; RDCA ch. IV, 2; VI, 1
§ 2: c. 1198 § 4; GIRM 266; RDCA ch. II, 5, 14; ch. IV, 5, 11; ch. VI, 3

CROSS REFERENCES: cc. 1205, 1206, 1207, 1208, 1209, 1186, 1169, 1190, 1235

COMMENTARY

Rudolf Schunck

1. The tenor of § 1 corresponds with what was already established in no. 265 of the IMGR: "Altars, both fixed and movable ones, are consecrated according to the rite described in the liturgical books; movable altars, however, can simply be blessed." Indeed, the legislator has prescribed the dedication, in any case, for the fixed altar, and the dedication or blessing (both possibilities are licit) for movable altars. Thus, the Commission rejected the proposal of one of the consultors who asked that movable altars be only blessed, hence excluding the possibility of dedicating them.[1]

1. Cf. *Comm.* 12 (1980), pp. 381–382.

The dedication or blessing emphasizes the nature of the altar, its connection to God, since Jesus Christ himself is sacrificed on it.

In accordance with c. 1206, the dedication of both the fixed and movable altar is the responsibility of the bishop and those that are equivalent in law to him. Canon 1206 allows, however, that "any bishop or, in exceptional cases, a priest" can be deputed for a dedication to be carried out in the territory of the delegating bishop—the equivalent in law.

The dedication of the altar takes place during the Holy Mass; and the center of the ceremony is constituted by:

— the sprinkling with holy water of the altar not covered by altar cloths;

— the placement of relics under the altar, if such be the case;

— the unction of the table with chrism;

— the burning of incense on the table;

— and the placement of altar cloths on the altar.

The blessing of the altar, on the contrary, is the responsibility of the ordinary, who can delegate it to another priest. The main parts of the blessing of the altar are the prayer of blessing, the sprinkling with holy water of the altar without altar cloths, and the placement of the altar cloths. This subject is meticulously regulated in chap. IV of the RDCA .

2. There is a reference in § 2 to the ancient tradition of the Church of venerating the saints and of placing their relics under fixed altars.

From the seventh century on, an increase of the number of side altars due to the increase of private masses and the worship of the saints can in fact be observed. It was even believed that each relic needed an altar and that each altar should have its relic. This is where the tradition of introducing relics in movable altar stones originated.

The post-council liturgical reform emphasized the idea that the altar is a symbol of Christ, and that, consequently, it was reserved for the offering of Christ himself. This led to certain modification related to how the relics should be placed in the altar. Initially, the GIRM, 66, accepted "the usage of burying the relics of the Saints in the altar that is going to be consecrated or putting them under the altar, even if they are not Martyrs." Later, the RDCA, however, ordered that the relics should only be placed under the altar. The RDCA had also established the norms concerning this matter (see chapter IV, 11):

— the relics must show, due to their size, that they are part of a human body; thus, those that are excessively small should be excluded;

— it should be known for a fact that the relics are authentic (cf. GIRM, 266); so that it is preferable to dedicate an altar without relics rather than doing it with relics of doubtful authenticity;

— the reliquary should not be placed on, nor inside the table of the altar, but under it, at its base, taking into account the shape of the altar.

Finally, the canon states that the old usage[2] of placing under the fixed altar (not the movable one) relics of martyrs or other saints should be observed, which should be done in accordance with the liturgical norms that we have presented before.

2. Cf. SCSDW, Reply, III.1984, in *Notitiae* 20 (1984), pp. 192–193.

1238 **§ 1. Altare dedicationem vel benedictionem amittit ad normam can. 1212.**

§ 2. Per reductionem ecclesiae vel alius loci sacri ad usus profanos, altaria sive fixa sive mobilia non amittunt dedicationem vel benedictionem.

§ 1. An altar loses its dedication or blessing in accordance with can. 1212.

§ 2. Altars, whether fixed or movable, do not lose their dedication or blessing as a result of a church or other sacred place being made over to secular usage.

SOURCES: § 1: c. 1200 §§ 1–3
§ 2: c. 1200 § 4

CROSS REFERENCES: cc. 1169, 1212, 1235, 1237, 1367

COMMENTARY

Rudolf Schunck

1. Paragraph 1 of this canon deals with the execration or loss of the sacred character of altars, referring to the general regulations of c. 1212, that refers to the loss of the dedication or blessing of sacred places. According to this last provision, the execration of a sacred places is put into effect due to:

a) the destruction of most of it. The *CIC* does not include the norms of c. 1200 of the *CIC*/1917 that covered this case meticulously. Hence we have to define the meaning and range that should be attributed to the expression "most of it." We think that we can say that most of an altar is destroyed when the table evidences a large fracture—*enormiter* was the word used by the canon we just referred to—or if a significant part of the table of the altar is lost or destroyed; in the case of a fixed altar, if the plinth is separated from the table, etc. These criteria, inspired by the previous legislation, can be useful when trying to interpret what was meant by the "destruction of most of it [the altar]";

b) the permanent reduction *de facto* to secular uses. This kind of execration is new in the *CIC*, and is based on reasons of juridical security[1] applicable to cases of permanent desecration. The norm does not establish the legitimacy of such acts, since it is a different canon, c. 1376, the

1. Cf. *Comm.* 12 (1980), pp. 331–332.

one that defines the crime of desecration: "who profanes a sacred object, moveable or immovable, is to be punished with a just penalty";

c) legal reduction, by means of a decree from the proper ordinary, to secular uses. The ordinary can, given a just reason, issue a decree along these lines. Both in this case and in the previous one, the reduction to secular uses must be permanent, as it is what is implied in c. 1212, to be considered execration.

2. In the session of January 31, 1980, two consultors from the Commission for the revision of the *CIC* proposed the elimination of § 1, arguing that this matter was dealt with in the canon that regulated the dedication and blessing of sacred places.[2] The fact that the proposal was rejected means that altars—both fixed and movable—are considered to be independent for the *CIC*, and not merely a part of the sacred places where they are located. This circumstance is implied in the mere existence of this canon.

In accordance with this reason, the desecration of a church or any other sacred place does not automatically mean the loss of the dedication or blessing neither of fixed nor of movable altars (§ 2). It is implied that this criterion also works the other way around, in other words, that the desecration of a fixed or movable altar does not entail the desacralization of the sacred place in which it is located. Canon 1200 § 4 of the *CIC*/1917 explicitly says: "Exsecratio ecclesiae non secumfert exsecrationem altarium sive immobilium sive mobilium; et viceversa."

In view of the norms of the RDCA, V, 22, we should add that in the cases when an altar that was already dedicated or blessed is taken to a new church, it is not necessary to dedicate or bless it.

Execrated fixed or movable altars must be dedicated or blessed again. Since 1920, two formulae more brief than those used in the initial consecration of the altar right after it is built, provided by the Sacred Congregation for Rites on September 9, 1920, have been used to perform these rites[3] of re-consecration, when the consecrated character was lost due to any of the reasons provided by the law that was then in force. Nowadays, the RDCA does not include the old consecrating formulae of the SCRit nor has it substituted them by new dedications or blessings, expressly created to re-consecrate an execrated altar. Accordingly, we should conclude that these altars must be dedicated or blessed *ex novo*, as if they had never been consecrated before.

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2. Cf. ibid., pp. 382–383.
3. For the formulas of blessing, cf. *AAS* 12 (1920), pp. 449–453.

1239 **§ 1. Altare tum fixnm tum mobile divino dumtaxat cultui reservandum est, quolibet profano usu prorsus excluso.**

§ 2. Subtus altare nullum sit reconditum cadaver; secus Missam super illud celebrare non licet.

§ 1. An altar, whether fixed or movable, is to be reserved for divine worship alone, to the exclusion of any secular usage.

§ 2. No corpse is to be buried beneath an altar; otherwise, it is not lawful to celebrate Mass at that altar.

SOURCES: § 1: c. 1202 § 1
§ 2: c. 1202 § 2; SCRit Resp., 25 oct. 1933; SCRit Resp., 25 oct. 1942

CROSS REFERENCES: cc. 1210, 1235, 1242

COMMENTARY

Rudolf Schunck

1. This canon essentially covers the contents of c. 1202 from the *CIC*/1917, but it uses more abbreviated phrasing.

Paragraph 1 establishes that an altar must be used only for divine worship. This precept is a special norm and, as such, has priority over the general one present in c. 1210 that allows for anything that favors the exercise and promotion of worship, piety, and religion when it refers to a sacred place. Canon 1239 forbids any profane use of altars, both fixed and movable. The ordinary cannot, as was the case with sacred places, allow for other uses, even if they are not against the holiness of the place, unless they are for divine worship. The importance and use of the altar is thus emphasized, being reserved only for divine worship.

2. Paragraph 2 establishes that "no corpse is to be buried beneath an altar"; if the burial has taken place, mass cannot be held on that altar. The provisions of the July 27, 1878 and the July 18, 1902 SCRit, however, which accept the existence of a crypt with burials if it is separated by a vault, continue to be in force.

The *CIC* does not include the norm from c. 1202 § 2 of the *CIC*/1917, which provided that no grave close to the altar could be within a meter of it.

The principle on which these provisions are inspired is the distinction that Catholic tradition has always made between worshipping God and venerating the dead.

There is only one special case in which an altar and a grave have been joined: that of the mortal remains of the martyrs, saints, and blessed proclaimed by the Holy See.[1]

1. Cf. *Theologische Realenzyklopädie*, II (Berlin-New York 1978), p. 319.

CAPUT V
De coemeteriis

CHAPTER V
Cemeteries

1240 **§ 1. Coemeteria Ecclesiae propria, ubi fieri potest, habeantur, vel saltem spatia in coemeteriis civilibus fidelibus defunctis destinata, rite benedicenda.**

§ 2. Si vero hoc obtineri nequeat, toties quoties singuli tumuli rite benedicantur.

§ 1. Where possible, the Church is to have its own cemeteries, or at least an area in public cemeteries which is duly blessed and reserved for the deceased faithful.

§ 2. If, however, this is not possible, then individual graves are to be blessed in due form on each occasion.

SOURCES: § 1: cc. 1205 § 1, 1206 §§ 1 et 2; SCHO Resp., 13 feb. 1936; *IOe* 77
§ 2: c. 1206 § 3

CROSS REFERENCES: cc. 1169, 1177–1184, 1205, 1207, 1208, 1210, 1211, 1254

COMMENTARY

Rudolf Schunck

1. "The Church who, as Mother, has borne the Christian sacramentally in her womb during his earthly pilgrimage, accompanies him at his journey's end, in order to surrender him 'into the Father's hands.' She offers to the Father, in Christ, the child of his grace, and she commits to the earth, in hope, the seed of the body that will rise in glory (cf. 1 Cor 15:42–44)." (CCC, 1683).

The first Christians, guided by their hope in the future resurrection, buried—in caverns, pits, mausoleums, or catacombs—the deceased faithful, following a tradition that had already existed for many centuries among the people of Israel.

In fact, Hebrew burials, such as we can infer from the Old Testament, were performed in family or individual graves—Jesus Christ's grave was a cave in a garden close to the Golgotha, which belonged to Joseph of Arimathea (cf. Jn 19:41–42)—which were located in a rocky area close to the house in question (cf. Gn 23:17 and 23, 20; 1 Kings 2:10 and 11:43) and it is also known that there were communal burial sites (cf. Jer 26:23). There were also special places to bury foreigners (pilgrims), such as the one called "field of blood" (cf. Mt 27:8); in extraordinary situations, the head alone could be buried in certain places (2 Sm 4:12). Burning the corpses was considered an act of dishonor by the Old Testament. This is why Josiah burnt the idols and spread their ashes over the graves of the infamous (cf. 2 Kgs 23:6).

The propagation of Christianity in Rome converted the family graves into what we now know as cemeteries. Although the previous traditions were still followed, the family hypogea began to incorporate not only relatives, but also brethren in the faith. Little by little, as a consequence of this, they became Christian cemeteries. Initially, these cemeteries (which are known as catacombs) began to be named after the proprietary, but by the third century they became the Church's property, and were provided with a team of gravediggers[1] to dig up the galleries and to perform the burials.[2]

The places where Christian graves could be found sometimes became places of worship. This is what happened with those of the martyrs who were honored on their *dies natalis*. "The primitive celebration of the martyrs was strongly tied to the Eucharist, which was celebrated near the grave, since the martyrs' relics had an incalculable value for Christians."[3] During the time of the persecutions, the worship of the martyrs extended throughout Rome. Later, the memories of the martyrs separated themselves from the *martyria*—the place where they had been inhumed—and started being celebrated in the basilicas named after them.[4] This devotion resulted also in the desire to be buried close to the grave of the martyr; a practice which became well established very soon, particularly in Roman basilicas towards the end of the fourth century. Although this tradition was limited by several dispositions, the council of Mainz (around 813 A.D.)

1. Regarding the first gravedigger associations, cf. R. RODRÍGUEZ-OCAÑA, *Las asociaciones de clérigos en la Iglesia* (Pamplona 1989), pp. 21–22.
2. Cf. J.A. ABAD-M. GARRIDO, *Iniciación a la liturgia de la Iglesia* (Madrid 1988), pp. 139–140.
3. Ibid., p. 793.
4. Cf. ibid.

established that "nullus mortuus intra ecclesiam sepeliatur, sini [sint] episcopis, abbatis, aut dignis presbyteris, vel fidelis laici."[5] This norm became part of the decree of Gratian and allowed burials in the churches, which is not possible most of the time, and the bodies ended up being inhumed outside the church due to the scarcity of room.[6] The practice of cemeteries near the church spread during the Middle Ages.

2. The canonical legislator systematically places the regulation of the cemeteries in part III of book IV, "Sacred Places and Times"; and includes them in the concept of sacred places stated in c. 1205.

The *CIC* devotes cc. 1240–1243 to the subject, but does not say what should be understood by the word *cemetery*. During the period of review, however, it became clear that this term should be interpreted in a broad sense that includes not only the notion of the cemetery as a specific ground allocated for the burial of the deceased faithful, but also includes the "columbarium." A columbarium is a place where the ashes of the deceased are kept in small urns,[7] and was common in some countries, e.g., Japan and Germany.

CIC/1917 regulated this matter in a more comprehensive manner in cc. 1205 to 1214, included within the norms "De sepultura ecclesiatica." Up to modern time, the inhumation and other kinds of entombment had been the responsibility of the family of the deceased and the Church. It was only in the eighteenth century that the state began regulating this matter; and, during the nineteenth century, it became its exclusive responsibility. This situation is what motivated c. 1206 § 1 *CIC*/1917, by means of which the Church claimed its right to have its own cemeteries: "the Catholic Church has the right to have its own cemeteries."

During the preparatory phase of the *CIC*, the redactors discussed whether it was appropriate to preserve the previous prescription of c. 1206 § 1.[8] Some consultors thought that this canon could be eliminated, others were not sure that this was a proper right of the Church; one of the consultors wanted to claim this right, but argued that its exercise would entail certain inconveniences, which would be a heavy burden for the Church. In the end, once the ballot was finished, it was decided that the old norm should not be included.[9]

This does not mean that the Church has renounced its right to have its own cemeteries; the Church has in general the right to own temporal goods, cemeteries included, allocated for the attainment of its own objectives (cf. c. 1254).

5. *Mansi*, 14, 75.
6. Cf. J.A. ABAD-M. GARRIDO, *Iniciación a la liturgia*..., cit., pp. 140–141.
7. Cf. *Comm.* 15 (1983), p. 245.
8. Cf. *Comm.* 12 (1980), pp. 348–350.
9. Cf. ibid., pp. 348–349.

Paragraph 1 of c. 1240, "without questioning whether the civil authority acknowledges the right of the Church to own cemeteries,"[10] provides that, wherever this is possible, the Church should have its own cemeteries, or, at least, some space within civil cemeteries allocated for their deceased faithful. In both cases, these spaces must be blessed in due form in accordance to what is provided in the liturgical books (cf. c. 1205), since the constitutive dedication or blessing is a necessary requirement for the constitution of a "sacred place." It is also necessary that the proper authority allocates this place to worship or burial.

Paragraph 2 of the canon regulates those cases in which the Church may not have its own cemetery, nor any space within a civil cemetery. In those cases, each grave should be blessed separately.

3. Each country, depending on the nature of the Church-state relationship, presents specific norms concerning cemeteries, hence, we should take into account the regulations specific to each case.

The Spanish legislation concerning civil cemeteries currently in force does not allow the creation of spaces for confessional groups. According to law 49/1978, of November 3, "the funerary rites to be performed on each grave will be in agreement with what the deceased ordered, or, with what the family decides." The main principle here is that those burials that take place in these cemeteries do so "without any kind of discrimination for reasons of religion or of any other kind."[11]

10. J.T. MARTÍN DE AGAR, commentary on c. 1240, in *CIC Pamplona*.

11. Cf. Ley 49, November 3, 1978, regarding burials in municipal cemeteries, *BOEE*, no. 266, November 7, 1978; J. MANZANARES-A. MOSTAZA-J.L. SANTOS, *Nuevo derecho parroquial* (Madrid 1988), p. 562. For the regulation in Germany and references to the norms in Austria and Switzerland, cf. J. GAEDKE, *Handbuch des Friedhofs- und Bestattungsrechts*, (Cologne-Berlin-Bonn-Munich 1983).

1241 **§ 1. Paroeciae et instituta religiosa coemeterium proprium habere possunt.**

§ 2. Etiam aliae personae iuridicae vel familiae habere possunt peculiare coemeterium seu sepulcrum, de iudicio Ordinarii loci benedicendum.

§ 1. Parishes and religious institutes may each have their own cemetery.

§ 2. Other juridical persons or families may each have their own special cemetery or burial place which, if the local Ordinary judges accordingly, is to be blessed.

SOURCES: § 1: c. 1208 §§ 1 et 2; SCCOnC Resol., 12 nov. 1927 (*AAS* 20 [1928] 142–145)
§ 2: cc. 1208 § 3, 1209; SCCOnC Resol., 12 nov. 1927 (*AAS* 20 [1928] 142–145)

CROSS REFERENCES: cc. 94, 134 § 2, 607 § 2, 635, 710, 718, 731, 733 § 2, 741, 1180, 1205, 1210–1212, 1240 § 2, 1243

COMMENTARY

Rudolf Schunck

1. The prescription of this canon regarding the title ownership of the cemeteries refers to the possibility of owning a cemetery—proper or particular—in the juridical system of the Church. The provisions of secular law, which has its own norms regulating who can possess a cemetery are another matter; these precepts should also be observed.

The previous regulation could be found in c. 1208 of *CIC*/1917. This canon "required" that each parish have its own cemetery, unless the ordinary allowed for the existence of a cemetery shared by several parishes; exempt members of religious orders were "allowed" to have their own cemetery; and, finally, ordinaries could also "allow" other moral persons or families to have a private grave.

CIC/1917 emphasized the obligation and permission to have a private cemetery or private grave. The *CIC* follows a different approach and focuses on the notion of the sacred nature of the cemetery,[1] which associates the notion of title ownership with the guarantees that the title holder

1. Cf. J.T. Martín de Agar, commentary on c. 1241, in *CIC Pamplona*.

can offer to preserve this sacred nature. It can be said, consequently, that the present canon establishes a division implicit in its two paragraphs:

— if the cemetery belongs to the parish or to a religious institute, it is accordingly considered a sacred place, and should be blessed following the provisions of the liturgical books (§ 1);

— if the cemetery belongs to other juridical individuals or families, the local ordinary is allowed to bless it, and it then becomes a sacred place. The decision of whether to bless it or not is up to that ordinary.

The subject of title ownership was granted a secondary position, since the consultants realized that it is up to secular law whether to allow someone to have a special cemetery.[2]

2. Parish cemeteries are those where the faithful who belong to that particular parish or to the group of parishes, in the case where several parishes are title holders of the cemetery, should be buried, unless the deceased or those that are responsible for burying him had legitimately chosen a different cemetery. Furthermore, if the law does not forbid it—the *CIC* does not say anything about when it is forbidden, while the *CIC*/1917 (cf. c. 1224) did indicate who vetoed the election—everybody can choose the cemetery in which they want to be buried (see commentary on c. 1180).

The functioning of the parish cemetery must be regulated by specific norms (c. 1243) that may be applied to all the cemeteries in the parish, or to a specific case. These norms can be provided as statutes (cf. c. 94).

As has already been explained, since cemeteries can be considered as sacred places in a technical and juridical sense, they should be blessed at a convenient time and they are subject to the norms of the *CIC* regarding aspects as relevant as the acts that can be celebrated in it (c. 1210), desecration and its repair (c. 1211), loss of the blessing (c. 1212), etc.

The title ownership of the cemetery as far as the parish is concerned depends in practice on whether civil law allows it; in any case, it should be necessary to have the corresponding licenses required by the civil authority, and be subject to the special regulations that are provided by the latter regarding the functioning of cemeteries. In German law, for instance, cemeteries are granted a legal status of public law, and can be the property of a parish or an ecclesiastical institution (Kirchenstiftung), which, consequently, represents it.[3]

3. Religious institutes (c. 607 § 2) can also have their own cemetery, which, as in the case of the parish, is considered a sacred place. Neither the other forms of consecrated life—for example, secular institutes

2. Cf. *Comm.* 12 (1980), p. 350.
3. Cf. J. GAEDKE, *Handbuch des Friedhofs- und Bestattungsrechts* (Cologne-Berlin-Bonn-Munich 1983), p. 7, with ample jurisprudence.

(c. 710)—nor the societies of apostolic life (c. 731) are included in this statement. All these institutes and societies can also be, inasmuch as they have a legal status, the title holders of a specific cemetery according to § 2 of the canon, but the blessing of the cemetery that transforms it into a sacred place is the responsibility of the ordinary.

The difference between these two kinds of cemeteries is not, consequently, based on the fact that they may or may not be ecclesiastical goods, since the goods of religious institutes (c. 635), the goods of secular institutes (c. 718) and the goods of societies of apostolic life (c. 741) are ecclesiastical goods. It is the legislator who has determined that all institutions but religious institutes depend on the judgment of the local ordinary to become sacred places. It should also be taken into account that the superiors of religious institutes and societies of apostolic life are not the local ordinaries (cf. c. 134 § 2).

In the *CIC*/1917 (c. 1208 §§ 2 and 3), the exempt religious were allowed to have their own cemetery, which was different from the common one, whereas in the case of nonexempt ones, the local ordinary could allow them to have a private grave that was also outside the common cemetery, which was blessed like other cemeteries are.

The expression "different from the common one" is not found nowadays either in the case of members of religious orders or in the case of the suppositions contemplated in § 2 of c. 1241. In any case, it seems to be logical that the cemetery of religious institutes be used precisely to bury the members of the institute that have died, and, in more exceptional cases, to bury the faithful that have had a closer relationship with them (e.g. benefactors). But, since the norm does not forbid it, we could also find a cemetery whose title ownership belongs to a religious institute in which all kinds of Christian faithful are buried. These cemeteries of members of religious orders must have their own norms of functioning (c. 1243).

4. Finally, the canon provides that "other juridical persons or families may each have their own special cemetery or burial place" (§ 2).

The term used by the *CIC* to designate these cemeteries is *peculiare* cemetery, whereas in the case of parishes and religious institutes, the expression used is *proprium* cemetery. The *CIC*/1917 went even further: in the case of parishes it used *suum quaeque* cemetery, the cemetery of exempt members of religious orders was normally referred to as *proprium*; and in all other cases the term used was *peculiare sepulcrum*.

The official English translation of the Code regarding both expressions (proper and particular) is "proper cemetery"; on the other hand, the translation of *CIC*/1917 was distinct in each of its three cases: "its cemetery" (supposedly the parish), "proper cemetery" (in the case of exempt religious), and "particular grave" (the remaining possibilities).

It seems that the *CIC* intended to distinguish in c. 1241 the different cases, using two different paragraphs, and two different terms. This leads to translating *peculiare coementerium seu sepulcrum* as "private" or personal "cemetery or mausoleum," which better emphasizes the difference between the cemeteries of the parish and religious institutes and the cemeteries of other juridical individuals and families.

The concept "other juridical persons" includes the whole range of cases that can be found in the canonical system, without differentiating between public and private juridical persons; thus, a private cemetery or mausoleum can be owned by the diocese, the cathedral chapter, the association of the faithful with legal status, etc.

Families can also have a *peculiare* cemetery or mausoleum. According to the previous legislation (c. 1208 § 3 of the *CIC* 1917), the local ordinary should grant, in the case "of other moral persons or families," the license to have a private grave. The current legislator, as we have explained before, does not authorize nor deny the license to own sacred places, since what the Church is interested in is not the property of the cemetery but its sacred character. In view of this, c. 1241 § 2 provides that, the cemetery or mausoleum will be blessed according to the judgment of the local ordinary. The decision of the local ordinary will depend on the guarantees that can be provided for the fulfillment of private law and the respect of the sacred character that the blessing grants these places (cf. cc. 1205 and 1243).

We should not forget, however, that when a member of the faithful is buried in a cemetery that is not blessed, the grave must be blessed (c. 1240 § 2), since the deceased faithful must rest in a sacred place.

1242 **In ecclesiis cadavera ne sepeliantur, nisi agatur de Romano Pontifice aut Cardinalibus vel Episcopis dioecesanis etiam emeritis in propria ecclesia sepeliendis.**

Bodies are not to be buried in churches, unless it is a question of the Roman Pontiff or of Cardinals or, in their proper churches, of diocesan Bishops even retired.

SOURCES: c. 1205 § 2; CodCom Resp. 15, 16 oct. 1919 (*AAS* 11 [1919] 479); SCCouncil Resol., 10 dec. 1927 (*AAS* 20 [1928] 261–264)

CROSS REFERENCES: cc. 4, 350 §§ 1–3, 368, 381 § 2, 1214, 1223, 1226

COMMENTARY

Rudolf Schunck

1. The fourth century brought along an important change in the way Christians were buried. The faithful begin to be buried in the subsoil of the new basilicas next to the grave of the martyrs. This usage spread little by little despite the reluctance, and sometimes explicit prohibitions, with which it was met both in the East and in the West.[1]

From the ninth century onward, by virtue of a provision of the council of Mainz (813 A.D.) that authorized the burying in churches of bishops, abbots, prominent presbyters and lay faithful,[2] the graves inside the churches multiplied, particularly those in convents, for the clergy and lay faithful of prominent social status.[3]

The *CIC*/1917 (c. 1205 § 2) provided a general prohibition to bury anyone in churches, unless it was a diocesan bishop, an abbot, or prelate *nullius* (that were buried in their own churches) the Roman Pontiff, royal people, and cardinals.

Canon 1205 was interpreted in different ways that made this prohibition stricter:

1. For the case of the North African churches, cf. OPTATUS OF MILEVIS, *Sancti Optati Mileuitani libri VII*, book 3, chap. 4, in *CSEL*, XXVI, pp. 82–83.

2. "Nullus mortuus intra ecclesiam sepeliatur, sini [sint] episcopis, abbatis, aut dignis presbyteris, vel fidelis laici." *Mansi*, 14, 75.

3. Cf. J.A. ABAD-M. GARRIDO, *Iniciación a la liturgia de la Iglesia* (Madrid 1988), pp. 140–141.

— the CPI, in 1919, extends the prohibition to bury to crypts or underground churches when they are dedicated to divine worship[4];

— the SCRit forbids the placement of gravestones with inscriptions or with the names of the deceased which were not *de facto* inhumed—or that could not be inhumed because c. 1205 § 2 forbid it—in the churches and crypts dedicated to worship[5];

— the SCCouncil also extended the prohibition to bury in the churches bones, ashes, and members that had been amputated.[6]

Furthermore, it did not tolerate the practice of transferring the corpse buried in the cemetery to a church after a certain period of time.[7]

2. The *CIC* preserves in c. 1242 the general prohibition to bury in churches, in other words, in the sacred building allocated to divine worship, to which the faithful have the right to enter for the public celebration of such worship (see commentary on c. 1214). Neither oratories (c. 1223) nor private chapels (c. 1226) are included in the limitation imposed by the canon, but all kinds of churches, be it a parish, rectory, or a sanctuary, etc. According to the answer of the CPI of 1919, crypts cannot be used to bury if they are destined for divine worship.

A burial should be defined—according to the decision of the SC-Council—both as the burial of a complete corpse and of the burial of bones, ashes, or parts of a corpse.

3. The prohibition to bury in churches does not include those enumerated by c. 1242, in other words, the Roman Pontiff, cardinals, and diocesan bishops. The differences between this precept and its parallel one in the *CIC*/1917 require a careful analysis.

a) The *CIC* does not include royalty in the list of exempt individuals, which was done in c. 1205 *CIC*/1917. This means that they have lost the right that they used to be granted. In these cases, we may find privileges and acquired rights which, if they are still in use and have not been revoked, continue to be intact, unless the *CIC* says otherwise (cf. c. 4).

b) The *CIC*/1917 included in the enumeration abbots and prelates *nullius*. The *CIC*, however, included only diocesan bishops, even those that are emeritus. Now, according to c. 381 § 2, diocesan bishops are equivalent in law to those that preside over other communities of faithful according to c. 368. Thus, territorial Prelates and Abbots, apostolic vicars and prefects and also apostolic administrators of an apostolic administration constituted in a stable manner, can be buried in their own churches.

4. Cf. CodCom, Resp., October 16, 1919, in *AAS* 11 (1919), p. 478.
5. Cf. SCRit, Resp., December 20, 1922, in *AAS* 14 (1922), p. 556.
6. Cf. SCCong, Resol., December 10, 1927, in *AAS* 20 (1928), pp. 261–264.
7. Cf. S. ALONSO, commentary on c. 1205, in *Código de Derecho Canónico y legislación complementaria*, 9th ed. (Madrid 1974), p. 467.

The fact that they may have been ordained bishops is not taken into account in all these cases of comparison; consequently, even if they are not bishops they are included in the possibilities of the norm and can be inhumed in their own church. Furthermore, since the term "emeritus" is applied to the diocesan bishop it can also be extended to those equivalent in law to him.

On the other hand, coadjutor and auxiliary bishops[8] are excluded from the right granted by the norm because the enumeration made by the canon is limiting.

c) Canon 1205 § 2 *CIC*/1917 specified that the corpses of diocesan bishops, abbots and prelates *nullius* will be buried in "their own churches," a provision that was not applied to the Roman Pontiff nor to the cardinals.

The *CIC* changes the criterion and prescribes that diocesan bishops, as well as those equivalent to them in law, and the cardinals will be buried in their own church, whereas the corpse of the Roman Pontiff can be buried in any church.

The proper church, in the case of the cardinals of episcopal rank, is implicit in the title, in other words, the suburbicarian church to which they are assigned (c. 350 § 1). Each Cardinal of the presbyteral and diaconal order is assigned a title or diaconate of the City (c. 350 § 2) which will be the proper church. Several proper churches can coincide in some cardinals, when besides being cardinals—of the episcopal or presbyteral order—they are diocesan bishops. Eastern patriarchs promoted to the cardinalate, however, preserve their patriarchal see as their title (c. 350 § 3).

The proper church par excellence for diocesan bishops and those equivalent to them is the cathedral church. Accordingly, the *Ceremoniale Episcoporum* determines that the diocesan bishop be buried in the cathedral church and only in exceptional circumstances in some other church. In the case of emeritus bishops, the burial should take place in the church of the last diocese over which he presided, unless the emeritus bishop has determined otherwise (no. 1164).

8. Cf. *Comm.* 12 (1980), p. 349.

1243 Opportunae normae de disciplina in coemeteriis servanda, praesertim ad eorum indolem sacram tuendam et fovendam quod attinet, iure particulari statuantur.

Appropriate norms are to be enacted by particular law for the management of cemeteries, especially in what concerns the protection and the fostering of their sacred character.

SOURCES: cc. 1209–1211

CROSS REFERENCES: cc. 1205–1213

COMMENTARY

Rudolf Schunck

1. The four canons—from c. 1240 to c. 1243—devoted in a general way by the *CIC* to regulate cemeteries, leave plenty of room for particular law to specify different aspects regarding cemeteries.

In fact, the universal legislator (as he insinuates in the prescriptions of c. 1240: see his commentary) is aware of the how diverse the title ownership or possession of cemeteries is in different countries, and also of how sensitive this matter is and how it results in a variety of uses that cannot be easily regulated in an adequate manner by common law.

This is why the more general aspects have been regulated and particular law has been granted plenty of room to take care of all other aspects that, even though they are not regulated by the *CIC*, must, however, be considered by inferior legislators to avoid distorting the Christian and sacred meaning that cemeteries must have. This will certainly be easier to protect in cemeteries that belong to parishes, religious institutes or other Christian institutions or families, than in those where the title ownership belongs to the state. In the case of the latter, it is necessary to keep in mind the agreements that may exist between the state and the Church regarding sacred places.

All this is included in the wording of c. 1243 when it establishes that the appropriate norms must be provided concerning the functioning in order to achieve a very specific goal: "the protection and the fostering of their sacred character."

2. These norms for particular law are the responsibility of the proper ecclesiastical authority—the local ordinary, who is the one entrusted to decide whether a cemetery should be blessed, according to c. 1241 § 2—

apart from who the proprietor of the cemetery may be.[1] The norms presuppose two different things:

— that the ecclesiastical authority can and must exercise its power and functions over all sacred places (cf. c. 1213);

— that the cemeteries over which the norms legislate must have been blessed in due form according to the prescriptions of the liturgical books; it is the blessing that transforms the cemetery into a sacred place.

If the cemeteries have not been blessed (cf. c. 1241), this would mean that the local ordinary does not consider them suitable to be sacred places, either because they do not fulfill the minimum requirements provided by common and particular law, or because there are not sufficient guarantees to protect and enhance in them, due to whatever reasons, their sacred character. It is the same ecclesiastical authority that excludes such cemeteries from its competence after a weighted judgment. When the title owners of a cemetery, which usually presents a private character (*peculiare*) (see commentary on c. 1241 § 2), ask for it to be blessed, the ecclesiastical authority is responsible for demanding the previous fulfillment of the requirements that are deemed appropriate so that the particular or private cemetery can become a sacred place, over which, from that moment on, the ecclesiastical authority exercises its triple *munus*, especially that of the regime.

3. Particular law, inasmuch as it is a manifestation of the powers that the ecclesiastical authority exercises over sacred places, can be enacted in different ways: thus, in some German dioceses, for instance, there are by-laws regarding cemeteries.[2]

It is also possible for the statutes that rule the functioning of a specific cemetery to have a control, review, and approval function. Statutes are especially appropriate in private cemeteries—although they are also useful in all cases—because the ecclesiastical authority can determine in view of them whether the necessary conditions for them to become sacred places are met, being consequently able to require the necessary amendments and improvements to protect and foster their sacred character. The statutes can clearly specify the responsibilities of the ecclesiastical authority.

4. These last specifications are related to the next point that we are going to explore that refers to the matters particular law must regulate in regards to the cemeteries as sacred places. On this matter, the *CIC* only says that they will address the functioning of these cemeteries so that their sacred character is protected and fostered.

1. Cf. J.T. MARTÍN DE AGAR, commentary on c. 1241, in *CIC Pamplona*.
2. Cf. "Boletín diocesano de la diócesis de Münster," in *Kirchliches Amtsblatt Münster* 1974, art. 338.

Consequently, the norms will aim to develop, specify, or itemize the aspects that are regulated by the canons that deal with sacred places in general and with cemeteries in particular. Among these matters, we can point out the following:

— preservation of the act of blessing the cemetery (c. 1208);

— verification of the fact that the proprietors were aware of the blessing, to prove that it is a sacred place (c. 1209);

— title ownership of the cemetery on behalf of the parish, the religious institute, any other juridical person, or families (c. 1241);

— who the ecclesiastical authority is and what his responsibilities are (cc. 1213 and 1243);

— care of the cemetery by the chaplain: appointment, functions, etc.;

— uses of the cemetery that are not against the sanctity of the place (c. 1210);

— security measures to prevent those acts that may violate the sanctity of the place (c. 1211);

— attention to repairs and material care (c. 1212);

— norms concerning the church or chapel of the cemetery: staffing, functions to be celebrated in it, etc.

— clause of review and approval of the statutes, etc.

There are three canons mentioned as the sources for c. 1243 (1209–1211) from the *CIC*/1917 that are a little bit more specific regarding the spirit of the norm. They deal with the following subjects:

— the need for a written license from the local ordinary or his delegate to construct private graves, which can be alienated, within the parish cemeteries or those of moral persons;

— if possible, the graves of the clergy will be separated from those of the lay people, and will be located in a dignified place; and also, if it can be done, there will be special graves for infants;

— cemeteries must be enclosed and guarded with care;

— the epitaphs, funeral praises, and ornaments should not be unworthy of the catholic religion and piety.[3]

3. Regarding the trappings and candles used at burials, cf. SCRit, Resp., October 30, 1922, in *AAS* 14 (1922), p. 598.

TITULUS II
De temporibus sacris

TITLE II
Sacred Times

INTRODUCTION

José A. Abad

Despite the subtitle, the sacred times to which title II refers are restricted to feast days and days of penance, as was the case of *CIC*/1917. This approach is not completely adequate, because these are not all the sacred times, nor the most important ones, and the framework in which they should be considered is not indicated, at least not globally.

1. *The liturgical year as a frame of reference*

Indeed, holy days of obligation and days of penance should be considered within their specific framework: the liturgical year, since the "Holy Mother Church believes that it is for her to celebrate the saving work of her divine Spouse in a sacred commemoration on certain days throughout the course of the year" (*SC* 102). Holy days of obligation and penance days can only be deeply understood within this greater framework. Furthermore, it is only within this greater framework that we can perceive what the appropriate place for holy days of obligation and penance days is within the life of the Church and the faithful, since without it, besides not understanding clearly the final end of these days, it can create the impression that these are the only or the most important sacred days, which is not true.

Indeed, the main sacred days are those of the Sacred Triduum (from the Evening Mass *In Coena Domini* to the second vespers of Easter Sunday) and, within it, the Easter Vigil; followed by Sundays; and finally the main times of the liturgical year: Advent, Lent, and Christmas, and the holy days of obligation of the year. All these days are sacred because they celebrate the mystery of Christ, "from the Incarnation and Nativity to the

Ascension, to Pentecost and the expectation of the blessed hope of the coming of the Lord" (*SC* 102). The Church "thus recalling the mysteries of the redemption, she opens up to the faithful the riches of her Lord's powers and merits, so that these are in some way made present for all time; the faithful lay hold of them and are filled with saving grace" (*SC* 102).

After the days and times that directly celebrate the Mystery of Christ (Temporal) come those in which the "Holy Church honors Blessed Mary, Mother of God, with a special love. She is inseparably linked with her son's saving work" (*SC* 103); in admiring and exalting the most splendid fruit of redemption and joyfully contemplating Mary as the perfect image of what the Church and the faithful should be, the faithful and the Church perfect themselves every day.

The last place in importance is occupied by the celebration of the Saints, since they are below Christ and Mary. The days of their celebration, however, are also sacred, inasmuch as "by celebrating their anniversaries the Church proclaims achievement of the paschal mystery in the saints who have suffered and have been glorified with Christ. She proposes them to the faithful as examples who draw all men to the Father through Christ, and through their merits she begs for God's favors" (*SC* 104).

According to this, there should have been a reference to, or at least a summary of, the liturgical year, and we should have located within it the holy days of obligation and days of penance; the importance granted to Sundays would have thus been better explained (c. 1246), as well as the reasons that Good Friday (c. 1251), and all the days during Lent (c. 1250), especially Ash Wednesday (c. 1251) are days of penance; or, if only these ones were intended to be dealt with, the title should have been something like holy days and penitential days of obligation."

On the other hand, a classification of the days is missing, since—as the *General Norms* of the liturgical year indicate—there are solemnities, feasts, memorials, and ferial days. Canon 1246 could at least have used the term *solemnity* to refer to holy days of obligation that are not Sundays, thus emphasizing the importance that these days have, since all of them are solemnities of the Lord, the Blessed Virgin, and the Saints.

2. *Feast days*

The greatest change in the *CIC* concerning this point lies in the doctrine of the prime importance of *Sundays*, so much so that we could argue that for the first time in canonical history we have found a treatment that corresponds to its nature, to the importance that Sunday had in ecclesiastical life during the first centuries, and to the influence that it should again have on ecclesiastical life. This is a consequence of adopting the spirit and

letter of Vatican Council II, which in turn is influenced to a great extent by the modern liturgical movement. Let us pause, if only momentarily, to justify these assertions.

a) *Sunday in the first centuries of Christianity*

Sunday was the only Christian "feast" until well into the second century. At this point, the specially solemn yearly commemoration of Easter was added to the hebdominal celebration of the Resurrection of the Lord. Although the Churches in Asia celebrate it on the fourteenth day of Nisan, most of them used to do it on the Sunday following this date; and this was the practice that ended up becoming common. This situation continued until after the peace of Constantine, when there was an outstanding development of what we now call "the Liturgical Year." According to this, we could argue that the liturgical life of the different Christians during the first few centuries had the Sunday celebration as its framework.

There is unanimity regarding the content of this celebration in all Churches both in the East and in the West: it is a matter of celebrating the Resurrection of the Lord, and the presence of the Resurrected One through the Eucharist, the centrality of which was such that celebrating Sundays without celebrating and participating in the Eucharist was theologically and pastorally unthinkable. The fact that the Resurrection was the central object of Sundays resulted in it also being considered the "day of the new creation," "the eighth day," and "the day of joy and happiness"; since the Resurrection inaugurated a new state of things, anticipated on earth the first appearances of the rest that the chosen ones will enjoy one day in Heaven, and initiated true Christian happiness, which is no other than the joy of knowing that we are have been saved.

Up to the end of the fourth century, Sundays were working days because Christians were a minority powerless against the civil laws of the empire. Hence, they did not think it incompatible to celebrate on Sunday and to continue with their ordinary jobs. In any case, when Constantine forbade agricultural works and subsequent emperors forbade forensic work, etc., their decision was welcomed by the clergy and faithful because they believed that resting was not only a way to restore their energies and to recover their necessary balance, but also to provide better opportunities to participate in the eucharistic celebration, taking into account the increase in the number of conversions that took place after the Peace of Constantine.

b) *Church law regarding the obligation to participate in the Eucharist and to rest*

No ecclesiastical law that forced the faithful to participate in the Eucharist and to rest from ordinary labors existed for several centuries. As we just indicated, Christians used to continue working on Sunday and, although they participated in the Eucharist regularly, they did so out of conviction and fervor. Nevertheless, for various reasons, they began to be

reluctant to participate and the fathers had to encourage the participation in the Eucharist although they did not initially think about the grave obligation for each and every Sunday.

St. Maximus of Turin († 408–423) was the first Western father who considered being absent from the Sunday Eucharist *an offense to God*, due to the fact that being absent entails scorning Christ's invitation; St. Caesarius of Arles († 542), on the other hand, is the first one to argue that such an offense is grave. Some time after this, c. 46 of the Council of Agda (506) sanctioned the compulsory nature *sub gravi* legally. This Council, together with those of Orleans (511, c. 26; 538, c. 32) and the *Statuta Ecclesiae Antiqua*—a document from the southern Gaul of the end of the fifth century—are part of the juridical base of the later Sunday discipline, that of *CIC*/1917 included, due to the fact that they were included in the canonical collections and in Gratian's decree.

c) *Later evolution*

Two important events took place during the Middle Ages. On the one hand, the participation in the Eucharist and resting became common practice among the faithful; on the other hand, the original meaning of Sunday became obscure, and very few priests and faithful considered it to be the day of the Resurrection of the Lord. This explains why its celebration was easily displaced by that of the saints, and that the Holy Trinity Mass often prevailed over that of the Sunday's Mass. Moral theology focused mainly on the casuistry, particularly on situations that dispense someone from participating in the Eucharist and from abstaining from working. The casuistry regarding working focuses on *servile* jobs since *liberal* ones are permitted.

St. Pius V provided a partial solution by increasing the number of days in which the celebration of the saints could not supplant that of the Sunday; but in the time of St. Pius X, the situation was such that it was difficult to celebrate even Sundays as such a meaningful time as Lent. This is why he decided to promote the renovation of Sundays.

On the other hand, the so-called "industrial revolution" brought along the massive abandonment of the Sunday Mass by the working classes, which were forced to work on Sundays. The most sensitized Christians fought to recover the Sunday rest, but they considered it to be a leisure time rather than a human, theological, and worship necessity, thus promoting the transformation of Sundays into a mere day of rest and amusement, often going against Christians ideals.

d) *Vatican Council II and the CIC*

The modern liturgical movement struggled from its beginning to recover the original meaning of Sunday, studying its theology and providing pastoral solutions. Sunday was once more referred to as the "Christian feast day *par excellence*," since it was "the day of the Resurrection." The idea that it was necessary to overcome the traditional division between

servile and liberal professions began to develop, and the theology of rest found new horizons. The *CIC*/1917, however, does not echo these new sensitivities yet, since it does not emphasize the importance of the Sunday within the celebrations of the liturgical year and still refers to the prohibition and permission of servile and liberal professions.

The conciliar constitution of Vatican II contemplated and expanded the theological-pastoral heritage of the modern liturgical movement thus recuperating both the nature and the primacy of Sundays. The Code has referred to it substantially.

Furthermore, it has expressed the new problem that the scarcity of priests, the proliferation of very small and disseminated rural communities, as well as the overcrowding of urban parishes entail; all of which often hinders the celebration of the Eucharist. The Sacred Congregation for Sacraments and Divine Worship has recently promulgated a *Directory for Sunday celebrations when the presbyter is absent* (June 2, 1988),[1] which provides theological criteria and practical guidance for, on the one hand, preserving the meaning of Sundays, and on the other hand, offering solutions that, without being supplementary, help to celebrate some aspect of the Christian Sunday.

3. *Days of penance*

From the apostolic age, *Wednesdays* and *Fridays* are presented as days devoted to fast and prayer. This is a Christian innovation, since Jews—who considered Saturday as the sacred day *par excellence*—used to fast on Mondays and Thursdays. This change was intentional and it did cause some controversy, as we can infer from the words of *Didaké*: "Do not fast like the hypocrites, which do so on the second and fifth day after Saturday, but on the fourth and sixth day." Wednesdays should be used to remind the faithful of Judas' betrayal, and Fridays are associated with Easter.

These days were called *stationes* in Rome. Hermas refers to them when he tells us how he saw the pastor next to him one day, and the latter asked him why he had climbed to the top of the mountain where they were so early in the morning, and Hermas responded: "Because I am doing the station." On being asked by the pastor what that was, he answered: "I am fasting, Lord."[2]

Tertullian provides more details about the *statio* in Africa: it was not compulsory there, and it entailed the eucharistic celebration and the

1. SCSDW, *Directorium de celebrationibus dominicalibus absente presbytero*, in *Notitiae* 24 (1988), pp. 366–392.
2. *Simil.* V, 1, 2.

communion of the faithful,[3] although many people did not do it because they thought they would be breaking the fast. This is why Tertullian encouraged them to receive the Body of Christ in their homes, once they had finished fasting.[4] The fast concluded at the none hour, dinner time for the Romans, so it could be considered as a semi-fast, although zealous Christians practiced it in a very strict manner, depriving themselves even from drinking water.

Jerusalem, like Africa, concluded the *statio* with the eucharistic celebration towards the end of the fourth century; in Alexandria, however, stational days were non-liturgical. Something similar must have happened in Rome where Fridays were concerned, since still in the fifth century, Innocent I is categorical when he refers to the tradition of not celebrating the Eucharist on that day; there are no definite data regarding Wednesday, but we know that it soon lost its liturgical status, and its memory was preserved in the four ember days.

As far as fast is concerned, the East preserved the Wednesday fast; it was never very popular in the West, but it was preserved up to the tenth century in the form of abstinence. The Friday fast was more popular; furthermore, Pope Nicholas I refers to it in a letter to the Bulgarians as if it were a general law.[5] This fast became a mere form of abstinence, and this is how we know it nowadays.

Besides Wednesdays and Fridays, Saturdays were also a day of fasting in some western churches, like Spain; in any case, the churches that followed this tradition cannot have been many because churches in Africa, Gaul, and Milan followed the Eastern tradition, according to which fasting was forbidden. The variability of the discipline continued in the West up to the year 1000 when it was gradually displaced by the abstinence of meat. It is true that the Roman synod of 1078 sanctioned its observance with a general law, but it did not become generalized until the fourteenth and fifteenth centuries. From that moment on, it was in force until Pius X, taking into account the current circumstances, abolished it definitively. The *CIC*/1917 confirmed this decision (cc. 1250–1254).

A third group of penance days is the so-called *four ember days*. This term refers to the Wednesday, Friday, and Saturday that are devoted to fasting at the beginning of each of the four seasons. These days were referred to as "the fast of the first, fourth, seventh and tenth month" in the fifth century; but from the seventh century on, they were referred to as "four ember days." Since the time of St. Gregory VII († 1085) the winter ember days were always in December, on the third week of Advent, the spring ones were on the first week of Lent, the summer ones were on the

3. *De Oratione*, 19.
4. *De Ieiunio* 2, 10, 13.
5. *Ad consult. Bulg.*, 4.

eighth week of Pentecost, and the fall ones were on the third week of September.

Although their origin and nature are not clear, it is quite possible that these penance days were a christianization of the rural, pagan feast days, which were called *feriae messis*, *feriae vendimiales* and *feriae sementivae* in Rome, and were celebrated during the summer (June–August), after the wheat harvest; in September, after the harvest of the grapes, and in December, at the time of seeding; in fact, initially and for several centuries, the ember days were not celebrated on any particular week, but they had to be announced each single time following formulae similar to those preserved in the Gelasiano. On the other hand, it seems that the spring ember days did not initially exist; they were added later to complete the yearly cycle of the seasons.

The four ember days took a long time to become popular outside Rome since, still in the sixth to the eighth centuries, they were not celebrated in some churches of the continent. One of Charlemagne's capitulars from the year 769 requires the priests to celebrate them and to announce them to the faithful. They were not introduced in Milan until after the twelfth century and only as fast days.

On the other hand, they were not celebrated uniformly until the eleventh century, since in Gaul and Germany, some celebrated the ones of March in the first week of June and others did it on the first week of Lent. Not even in Rome was there agreement about the date. To avoid these inconveniences, which affected civil life because the date was certainly important, several councils and writers worked to unify the discipline. Gregory VII ordered that, in accordance with the traditions of the Roman churches, the feast days of the first month should be celebrated on the first week of Lent, and those of summer on the eighth week of Pentecost. This legislation was confirmed in the Council of Piacenza (year 1095) by Urban II. This remained in force until the Vatican II reform, which has left the regulation of the time, duration and celebration in their territory to the Bishop's Conferences (in Spain, it is celebrated on the fifth and seventh of October, or at least on the fifth; these dates are very appropriate for the rural cycles, and can be easily be associated with the beginning of the academic year in urban areas, or with the continuation of the tasks that were interrupted by the summer). They are called *major feast days of petition and thanksgiving* and, as we can infer from their name, they are not penance days. This is why the Code, unlike that of 1917, no longer refers to them among the penitential days.

The *litanies* are the fourth group of penance days. The institution of the *Litaniae minores* is attributed to St. Mamertus, bishop of Vienne, who provided that on approaching the day of the Ascension, all his people should participate on a procession with litanies that concluded in a church in the suburbs of the city, to beg God that the terrible earthquake that had desolated the area did not happen again. Some time later, the

synod of Orleans (511) prescribed its observance in all the churches of the kingdom of the Franks. It required that during the three days prior to the Ascension—that were already called *Rogationes* then—people fasted like they did during Lent, and that the slaves should not be allowed to work. The *processions*, which were included in the ordinary of all the main churches, soon became one of the most important liturgical celebrations, so much so that even kings, princes, magistrates, etc., participated in them. The so-called *litanies of the saints* were introduced later, at the beginning of the ninth century. They included psalms, chants, etc., but the litanies were the most important prayer elements, since they were the ones that contributed most to promote the participation of the people. The *litanies* prior to the Ascension disappeared with the new organization of the calendar realized in the recent liturgical reform. This is why the Code does not refer to them as penance days either.

1244 **§ 1. Dies festos itemque dies paenitentiae, universae Ecclesiae communes, constituere, transferre, abolere, unius est supremae ecclesiasticae auctoritatis, firmo praescripto can. 1246 § 2.**

§ 2. Episcopi dioecesani peculiares suis dioecesibus seu locis dies festos aut dies paenitentiae possunt, per modum tantum actus, indicere.

§ 1. Only the supreme ecclesiastical authority can establish, transfer, or suppress holy days or days of penance which are applicable to the universal Church, without prejudice to the provisions of can. 1246 § 2.

§ 2. Diocesan Bishops can proclaim special holidays or days of penance for their own dioceses or territories, but only for individual occasions.

SOURCES: § 1: cc. 1243, 1244 § 1; SCPF Ind., 15 mar. 1951, 3 et 4
§ 2: c. 1244 § 2

CROSS REFERENCES: cc. 1245, 1246 § 2, 1251, 1253

COMMENTARY

José Antonio Abad

This canon differs from the *CIC*/1917 in two main areas: the wide competence granted to bishops' conferences (cf. cc. 1246 § 2, 1251, 1253)—nonexistent in the *CIC*/1917—and the notion of *days of penance* (cf. c. 1249) that is new and more extensive than that of the *days of fast and abstinence* of cc. 1250–1254 *CIC*/1917.

Canons 1244 and 1245 identify who the *proper authority* is to establish, transfer, or suppress feast days or days of penance, and refer to three subjects: 1) the Apostolic See, 2) the bishop, and 3) the parish priest and the superior of a religious institute or a clerical society of apostolic life of pontifical right.

1. Paragraph 1 indicates that the Apostolic See has an exclusive and universal competence, which does not affect what is provided by c. 1246 § 2 regarding the suppression or transfer to Sunday of some holy days of obligation on behalf of the Bishop's Conferences, once the Apostolic See grants its authorization. This is a specific application of what is provided in *Sacrosanctum Concilium* 22 regarding authority in liturgical matters, as well as the authority of self-governance within the Church.

2. Paragraph 2 provides that diocesan bishops have the power, within their diocese or places, to indicate special feast days and days of penance, but *not* in an established and definitive mode except *ad actum*. For example, they could establish a day of penance in a specific place to repair the profanation of the Holy Eucharist in the church of that Christian community; or they could establish the day of the canonization of a saint that is very popular in their diocese as a feast day.

We should note that, apart from the restriction that we have already mentioned, two other restrictions are specified: *a*) the canon does not contemplate the suppression or transfer of the feast days or days of penance, it rather refers to the *establishment* of such days; and *b*) it does not refer to bishops in general, but to the diocesan ones, and the right that is assigned to them is a *proper* one, since it may be necessary for the adequate fulfillment of their pastoral function, according to the doctrine of *Christus Dominus* 8, and taking into account what cc 87 and 381 § 1 provide. It may also be echoing the *Sacrosanctum Concilium* 22, where it is said that bishops have the liturgical authority that is determined by the law.

3. Regarding the competencies of the parish priest and of the superiors of a religious institute or society of apostolic life of pontifical right, see commentary on c. 1245.

1245 **Firmo iure Episcoporum dioecesanorum de quo in can. 87, parochus, iusta de causa et secundum Episcopi dioecesani praescripta, singulis in casibus concedere potest dispensationem ab obligatione servandi diem festum vel diem paenitentiae aut commutationem eiusdem in alia pia opera; idque potest etiam Superior instituti religiosi aut societatis vitae apostolicae, si sint clericalia iuris pontificii, quoad proprios subditos aliosque in domo diu noctuque degentes.**

Without prejudice to the right of diocesan Bishops as in can. 87, a parish priest, in individual cases, for a just reason and in accordance with the prescriptions of the diocesan Bishop, can give a dispensation from the obligation of observing a holyday or day of penance, or commute the obligation into some other pious works. The Superior of a pontifical clerical religious institute or society of apostolic life has the same power in respect of his own subjects and of those who reside day and night in a house.

SOURCES: c. 1245; CodCom Resp. III, 12 mar. 1929 (*AAS* 21 [1929] 170); SCEEA Ind., 19 dec. 1941 (*AAS* 33 [1941] 516–517); SCCouncil Ind., 22 ian. 1946 (*AAS* 38 [1947] 27); *Paen* VII

CROSS REFERENCES: cc. 87 § 1, 89

COMMENTARY

José Antonio Abad

This canon directly refers to the authority of the parish priest and the superior of a religious institute or a society of apostolic life, if they are clerical and of pontifical right, to dispense the obligation to observe a day of obligation or penance. This is a power that is located in the framework of c. 87 § 1 (in which diocesan bishops are authorized to dispense from *disciplinary* laws, universal or particular, and that is here explicitly preserved), and in c. 89, which provides a general principle that here is the object of an exception. In any case, neither the transfer nor the creation of new feasts or penitential days is addressed here, but rather only the ability to dispense from them. This is understandable because neither the parish priest nor the superior in question have any authority in liturgical matters (*SC* 22).

1. Two conditions are provided for the faculty of the parish priest: *a*) it should be limited to specific cases—neither permanent nor definitive; *b*) it should deal with the dispensation of the inherent obligations of feast days or penitential days; *c*) in the case of penitential days, there may be a dispensation or commutation by other pious acts (the classical ones are alms and prayer); *d*) the dispensation or commutation refers to one's subjects, both within and without one's territory; and *e*) it must be exercised with just cause and without defying what the bishop has provided (c. 89).

2. In the case of religious superiors: *a*) we are talking about local superiors of a religious institute or a clerical society of apostolic life of pontifical right; *b*) the subjects are both one's subjects and the people that live in their houses (e.g., the service staff); and *c*) it is taken for granted that there is a just cause and it does not defy the provisions of its major superiors.

The doctrine of this canon is in substantial agreement with that of c. 1245 of the *CIC*/1917.

CAPUT I
De diebus festis

CHAPTER I
Feast Days

1246 **§ 1. Dies dominica in qua mysterium paschale celebratur, ex apostolica traditione, in universa Ecclesia uti primordialis dies festus de praecepto servanda est. Itemque servari debent dies Nativitatis Domini Nostri Iesu Christi, Epiphaniae, Ascensionis et sanctissimi Corporis et Sanguinis Christi, Sanctae Genetricis Mariae, eiusdem Immaculatae Conceptionis et Assumptionis, sancti Ioseph, sanctorum Petri et Pauli Apostolorum, omnium denique Sanctorum.**

§ 2. Episcoporum conferentia tamen potest, praevia Apostolicae Sedis approbatione, quosdam ex diebus festis de praecepto abolere vel ad diem dominicam transferre.

§ 1. Sunday, on which by apostolic tradition the paschal mystery is celebrated, is to be observed in the universal Church as the primary holy day of obligation. The following feast days are also to be observed as holy days of obligation: the Nativity of Our Lord Jesus Christ, the Epiphany, the Ascension, Corpus Christi, Mary the Mother of God, her Immaculate Conception, her Assumption, St. Joseph, the Apostles SS Peter and Paul and All Saints.

§ 2. However, the Bishops' Conference may, with the prior approval of the Apostolic See, suppress certain holy days of obligation or transfer them to a Sunday.

SOURCES: § 1: c. 1247 § 1; *SC* 102, 106–108; *EMys* 25; PAULUS PP. VI, m. p. *Mysterii paschalis,* 14 feb. 1969, I (*AAS* 61 [1969] 223), SCRit Normae, 21 mar. 1969, 4, 5; *DPMB* 86; PAULUS PP. VI, Exhort. Ap. *Marialis cultus,* 2 feb. 1974, 20 (*AAS* 66 [1974] 131–132); PAULUS PP. VI, Let., 4 aug. 1977; SCCE Instr. *In ecclesiasticam futurorum,* 3 iun. 1979, 32
§ 2: c. 1247 §§ 2 et 3; SCCouncil Ind., 18 nov. 1958; SCRit Normae, 21 mar. 1969, 7

CROSS REFERENCES: —

COMMENTARY

José Antonio Abad

This canon has two paragraphs. In the first one (the most important and extensive) it specifies which are the feast days, and indicates two big groups: on the one hand, Sundays; on the other hand, a series of solemnities of the Lord, the Blessed Virgin, and the Saints.

When referring to Sunday, it deals with its origin, content, and importance by means of these three great statements: it can be traced back to the apostolic age, it celebrates the paschal mystery, and it is the Christian feast day *par excellence*. The three statements are taken almost literally from *Sacrosanctum Concilium* 106, and two of them (that of the nature and origin) are also inspired by *Sacrosanctum Concilium* 6. The most important statement is the one concerning the paschal mystery, since it justifies both the apostolic institution and the primacy of Sundays over all other feast days.[1]

In listing feast days, this canon does not explicitly mention the liturgical times, but it takes them into account, since the first one refers to feasts within liturgical seasons (Christmas, Epiphany, Ascension, Corpus Christi), then to those of the saints, within which it proceeds according to the following hierarchy: the Blessed Virgin (Holy Mary Mother of God, the Immaculate Conception and the Assumption), St. Joseph, the Holy Apostles Peter and Paul, and, finally, the solemnity of All Saints. It may have been appropriate to order the three solemnities according to the order in which they appear in the liturgical year (the Immaculate Conception, Holy Mary Mother of God and the Assumption); but the canon has preferred to follow the ontological enumeration, indicating that divine maternity is the basis for the entire Marian cult.

Paragraph 2 focuses on two issues: the suppression of certain feast days or their transfer to Sunday, and the competent authority in this matter. Since it is a question that, on the one hand, is important, and, on the other hand, affects only certain territories, the Code sought to combine two authorities: the bishops' conference—meaning the conference of the nation in question—and the Apostolic See. It is thus an application of what the *Sacrosanctum Concilium* 22 provided where it is said that the proper authority in liturgical matters is the Apostolic See, and, as far as the law provides, of the local assemblies of bishops, that were later defined as national assemblies or bishops' conferences. When trying to transfer a feast day to Sunday, bishops' conferences should take into account the *General Norms concerning the Liturgical Year and Calendar*, where it is provided that "in principle Sundays always exclude the assignment of any other celebration"

1. Cf., regarding Sundays, the Apostolic Letter of John Paul II *Dies Domini*, May 31, 1998.

(no. 6) and that "Advent, Lent, and Easter Sundays have precedence over all feast days of the Lord, and over all Solemnities" (no. 5).

On comparing this canon with that of the *CIC*/1917 (c. 1247), we notice that they differ in that c. 1247 of the *CIC*/1917 limited itself to pointing out the feast days of obligation, placing Sundays at the same level as the others—although it did mention it first, it did not refer to its origin and nature. Now, however, Sundays have the theological and juridical emphasis that they deserve, and this is also made explicit in the doctrine.

1247 **Die dominica aliisque diebus festis de praecepto fideles obligatione tenentur Missam participandi; abstineant insuper ab illis operibus et negotiis quae cultum Deo reddendum, laetitiam diei Domini propriam, aut debitam mentis ac corporis relaxationem impediant.**

On Sundays and other holy days of obligation, the faithful are obliged to participate in the Mass. They are also to abstain from such work or business that would inhibit the worship to be given to God, the joy proper to the Lord's Day, or the due relaxation of mind and body.

SOURCES: c. 1248, SCPF Resp., 2 dec. 1922; SCCouncil Instr. *Saepe numero*, 14 iul. 1941 (*AAS* 33 [1941] 389–391); SCCouncil Litt. circ., 25 mar. 1952 (*AAS* 44 [1952] 232–233); *SC* 106; SCPF Resp., 14 feb. 1966; *EMys* 25; *DPMB* 86 a

CROSS REFERENCES: —

COMMENTARY

José Antonio Abad

This canon focuses on the *way* in which the feast days should be celebrated. It differentiates between "Sundays" and "other feast days" following the classification of the previous canon, which enhances the importance of Sundays.

1. It specifies the *way* in which the feast days are to be celebrated both in a positive and in a negative way. In a *positive* way, it provides that the faithful must participate in the Mass; in a *negative* way, it forbids them to work under certain circumstances. The order that it follows, first the participation in the Eucharist, then resting, is not capricious or random. It reflects the nature of things, since it is not questionable that the primacy corresponds to the eucharistic celebration, since without it, it would not be possible to celebrate Sundays or any other Christian feast. In fact, Sundays were celebrated with zeal during the first few centuries, even though they were working days (see commentary on the book IV, part III, tit. II). Nowadays, many faithful have to work, but still celebrate the very core of Sundays or of the feast if they participate in the Eucharist.

The norms concerning the Mass incorporate the doctrine and terminology that was habitual from Vatican Council II by changing "attending" to "participating." In order to understand what underlies this expression, it is necessary to refer above all to *Sacrosanctum Concilium*, where it is

said that "Christ's faithful, when present at this mystery of faith, should not be there as strangers or silent spectators. On the contrary, through a good understanding of the rites and prayers they should take part in the sacred action, conscious of what they are doing, with devotion and full collaboration" (*SC* 48 and *passim*). We should also take into account the doctrine of the constitution itself (that is repeated in the later documents on this matter) on the unity existing between the liturgy of the word and the strictly eucharistic liturgy—even if we want to determine the range of its compulsory nature—a unity so close that they form *only one* act of worship (cf. *SC* 56).

2. Regarding the *degree of its obligatory nature*, it does not specify whether it is grave or light, nor whether it is an obligation that affects each and every one of the stated days or all of them as a whole. On comparing this canon with § 2 of the following one, however, which says that a "grave cause" can dispense from participating in the mass, we must conclude that the obligation to participate is also grave. On the other hand, if c. 1246 explicitly indicates the holy days of obligation, and this one specifies that in those days one should participate in the Holy Mass, this means that the obligation refers to each and every one of those specified, and that it is not contemplated by applying the principle of substantial totality. Furthermore, the legislator has aimed to follow the secular tradition of the Church, despite some recent opinions which are contrary to the precept,[1] in order to help the faithful to overcome their own carelessness and negligence, without forgetting the pedagogy that this obligation entails in order to underline *the importance of the important*, which, as we have already said, is the eucharistic celebration. More precisely, it was the pedagogical intention of enhancing the Sunday Mass which prompted the legislator not to include other practices, very commendable in themselves and in harmony with Sundays and feast days, such as vespers or other pious exercises.[2]

3. The *prohibition to work* is regulated in the following manner: those jobs that stop one from worshipping God, enjoying the happiness that is inherent to the Day of the Lord, or enjoying the appropriate rest of body and mind. It is not necessary that all these circumstances take place at the same time; it is sufficient if one of them occurs. In any case, it seems clear that the jobs that are forbidden in the first place are those that prevent us from worshipping God and, more specifically, from participating in the Eucharist.

The classical distinction between liberal and servile jobs has disappeared. This is a consequence of having adopted the current theology of work, the dignity of which comes from the person; so there is no reason to

1. Cf. H. MULLER, "De christifidelium obligatione missae dominicali participandi sub aspectu canonico," in *Periodica* 63 (1974), pp. 411–428.
2. *Comm.* 15 (1983), p. 251.

allow/forbid only some of them. According to this, the criteria to establish the kind of work that is allowed or forbidden must be that of ordinary work, since the person who frees him or herself from it will be able to participate in the Eucharist, enjoy the happiness inherent in Sundays, and rest the body and the spirit, since it will act as the *master* of time and things.

1248 **§ 1. Praecepto de Missa participanda satisfacit qui Missae assistit ubicumque celebratur ritu catholico vel ipso die festo vel vespere diei praecedentis.**

§ 2. Si deficiente ministro sacro aliave gravi de causa participatio eucharisticae celebrationis impossibilis evadat, valde commendatur ut fideles in liturgia Verbi, si quae sit in ecclesia paroeciali aliove sacro loco, iuxta Episcopi dioecesani praescripta celebrata, partem habeant, aut orationi per debitum tempus personaliter aut in familia vel pro opportunitate in familiarum coetibus vacent.

§ 1. The obligation of participating in the Mass is satisfied by one who assists at Mass wherever it is celebrated in a catholic rite, either on the holy day itself or on the evening of the previous day.

§ 2. If it is impossible to participate in a eucharistic celebration, either because no sacred minister is available or for some other grave reason, the faithful are strongly recommended to take part in a liturgy of the Word, if there be such in the parish church or some other sacred place, which is celebrated in accordance with the provisions laid down by the diocesan Bishop; or to spend an appropriate time in prayer, whether personally or as a family or, as occasion presents, in a group of families.

SOURCES: § 1: c. 1249; CodCom Resp. IV, 25 mar. 1952 (*AAS* 44 [1952] 497); Sancta Sedes Decl., 7 ian. 1954; SCCouncil Rescr., 2 iul. 1964; SCCouncil Rescr., 15 maii 1965; SCRit Let., 25 sep. 1965; SCCouncil Rescr., 19 oct. 1965; SCCouncil Rescr., 2 feb. 1966; SCPF Rescr., 14 feb. 1966; SCPF Rescr., 5 maii 1966; *EMys* 28; SCRit Normae, 21 mar. 1969, 3; *SCDW* Rescr., maii 1967

§ 2: *SC* 35, 4; *IOe* 37; PAULUS PP. VI, Alloc., 26 mar. 1977, 2 (*AAS* 69 [1977] 465)

CROSS REFERENCES: —

COMMENTARY

José Antonio Abad

The two paragraphs of this canon deal with very different issues, for while the first one focuses on the necessary rite and time to fulfill the precept of participating in the mass, the second deals with the reasons that would justify being dispensed from it, and, most of all, tries to provide a

pastoral answer to those who are unable to fulfill it, especially due to the lack of ministers to celebrate the Eucharist.

1. Regarding the *rite*, it *only* requires that the mass be celebrated according to the Catholic rite, either the one belonging to the Latin Church or the one belonging to the Eastern one; as far as the *day* is concerned it expands the schedule to twelve on the eve of the feast day. The Code has incorporated a practice that has been used since Vatican II—supported to a certain extent by the Jewish calculation of the day—but eliminating any type of restriction, since it does not require any just or grave cause to participate in the mass during this period of time. Furthermore, the expression "the day before in the evening" is a formula that is intentionally "general in order to avoid casuist situations and anxieties."[1] On the other hand, this hourly calculation does not affect resting, so that whoever decides to participate in the Eucharist on the eve of Sunday or feast day, can continue to work that very evening. The canon does not provide any condition regarding the *place*; hence, whoever participates in the mass that is celebrated in a parish, an oratory, a sacred or profane place, etc., fulfills the precept. The intention of the legislator is to facilitate the fulfillment of the precept.

2. Paragraph 2 deals with two different questions: the question of the causes that excuse one from participating in the mass, and some possible substitutes. As far as the former is concerned, it indicates two possible ones: the lack of a celebrating minister or a *grave* cause would prevent it. As far as the latter is concerned, it provides some means that can somehow substitute the participation in the Eucharist—although the Eucharist cannot, strictly speaking, be substituted by anything—these means are not compulsory or unique.

In accordance with the objective importance that the celebrations of the word have—as *Sacrosanctum Concilium* 35, has acknowledged—the canon "recommends them keenly" and in the first place, if they are celebrated both in a sacred place or in another one authorized by the bishop; then it suggests private and family prayer. But these are just some of the many examples that it could suggest.

Since the number of faithful that are deprived of participating in the Sunday Eucharist due to the lack of ministers is considerable, the Holy See, backing up the desires expressed by several Bishops' Conferences affected by this issue, has published a directory for Sunday celebrations in the absence of a priest (June 2, 1988)[2] in which after reinstating the nature of Sundays, the centrality of the Eucharist, and how it is impossible to substitute it (chap. I), it provides the conditions to perform these celebrations (chap. II) and draws the general outline of the celebration

1. *Comm.* 15 (1983), pp. 251–253.
2. *Notitiae* 24 (1988), pp. 366–378; Cf. also Instr. EdM, art. 7.

(chap. III), leaving it up to the bishops' conferences—when the situation thus requires—to provide more detailed norms and to adapt them to the character and diverse circumstances of the different peoples, although they must inform the Holy See (*Introduction*, no. 7). These celebrations are very commendable, since they provide an opportunity to listen to the word of God proclaimed (readings) and brought up to date (homily), to pray as a community, and to receive the holy communion; from a legal point of view, however, they are not obligatory.

In this canon the Code has shown a fine pastoral sensitivity.

CAPUT II
De diebus paenitentiae

CHAPTER II
Days of Penance

1249 **Omnes christifideles, suo quisque modo, paenitentiam agere ex lege divina tenentur; ut vero cuncti communi quadam paenitentiae observatione inter se coniungantur, dies paenitentiales praescribuntur, in quibus christifideles speciali modo orationi vacent, opera pietatis et caritatis exerceant, se ipsos abnegent, proprias obligationes fidelius adimplendo et praesertim ieiunium et abstinentiam, ad normam canonum qui sequuntur, observando.**

All Christ's faithful are obliged by divine Law, each in his or her own way, to do penance. However, so that all may be joined together in a certain common practice of penance, days of penance are prescribed. On these days Christ's faithful are in a special manner to devote themselves to prayer, to engage in works of piety and charity, and to deny themselves, by fulfilling their obligations more faithfully and especially by observing the fast and abstinence which the following canons prescribe.

SOURCES: cc. 1250, 1251; *SC* 5; *Paen* I–III; SCCouncil Rescr., 22 apr. 1966; SCCouncil Rescr., 24 feb. 1967

CROSS REFERENCES: —

COMMENTARY

José Antonio Abad

This canon focuses on two different issues: the penance of divine law and the penance of ecclesiastical law.

1. Regarding the former, the canon clearly indicates its compulsory nature and its universality: "All Christ's faithful are obliged ... to do

penance"; it does not, however, specify whether it is referring to penance in a strict sense, or to the external forms of this virtue. In any case, taking into account the spirit of the Apostolic Constitution *Paenitemini* of February 17, 1966, on which it draws almost literally, the term *penance* includes both the intimate and complete transformation and renewal of man through grace (inner dimension) as well as the external manifestations that this "metanoia" entails, among which we can find the voluntary and loving acceptance of the cross. Regarding interior change and the good works that derive from it, the doctrine is *uniform*: all faithful should do penance—since they are all sinners—and they should all perform good works; on the other hand, it is possible to have a *penitential plurality* in the external manifestations of the virtue. This is why the canon indicates that according to divine Law "everyone should do penance," but "each one in their own manner."

2. Regarding ecclesiastical penance, the canon is more specific: it refers exclusively to the *external forms* of the virtue of penance: "practices ... of penance." The legislator could have entrusted the determination solely to the wishes of the faithful; he has, however, preferred to provide "some common practice of penance" taking into account that the Church is a people and a body. Thus, it emphasizes that penance does not only have an individual character but also an ecclesial one. This general reason explains why "a series of penitential days" have been established, and that certain methods of penance are practiced during them. The specific practices are divided in four groups: *a*) prayer, *b*) works of piety and charity, *c*) fulfillment of one's own duties, and *d*) fasting and abstinence.

The nuances of the drafting are important. For example, it does not say that during these penitential times, the faithful should devote themselves to prayer, but rather that they do so "in a special manner"; this is also the case with the fulfillment of one's own duties, since it says that they should be performed "more faithfully" during these days; finally, it emphasizes the importance of fasting and abstinence since the clause "especially" only applies to them. This underlines, on the one hand, the *positive* character of penance and its incorporation to Christian life, and, on the other hand, the importance that the Church continues to give to *physical ascesis*.

But, the most important thing are the works themselves which this canon indicates: prayer, works of piety and charity, and self-denial especially in the fulfillment of social, family, and professional duties, and sobriety in food and drink. As the Apostolic Constitution *Paenitemini* explains, "the Holy Church, despite having always guarded in a special way abstinence from meat and fasting, aims to indicate in the 'prayer-fasting-charity' traditional triad the main ways of fulfilling the divine precept of penance." This is why, in places that enjoy good standards of economic welfare, the faithful must provide special evidence of asceticism, and, simultaneously, of charity toward the less fortunate, sharing their

goods with them; on the other hand, in the case of the most destitute ones, they will struggle to make their suffering one with Jesus Christ. On the other hand, due to the widespread break between faith and practice, it is particularly important to observe the recommendation to make an effort to fulfill one's own duties during the penitential days.

3. This is a programmatic canon for the others, and it was not present in the *CIC*/1917, which only specified the general obligation to do penance on days of fasting and abstinence. This has its main source in the Apostolic Constitution *Paenitemini* of Paul VI which incorporates the new circumstances and sensitivities of the Church.

1250 **Dies et tempora paenitentialia in universa Ecclesia sunt singulae feriae sextae totius anni et tempus quadragesimae.**

The days and times of penance for the universal Church are each Friday of the whole year and the season of Lent.

SOURCES: c. 1252; SCCouncil Decr. *Pia mater Ecclesia,* 29 ian. 1917 (*AAS* 9 [1917] 84); CodCom Resp., 3 ian. 1918; SCCouncil Decr. *Plures ex America,* 10 nov. 1919 (*AAS* 11 [1919] 462); SCPF Ind., 27 apr. 1920; SCCouncil Ind., 20 dec. 1940 (*AAS* 33 [1941] 24); SCCouncil Decr. *Cum adversa,* 28 ian. 1949 (*AAS* 41 [1949] 31–32); *SC* 110; *Paen* III, II §§ 1 et 2

CROSS REFERENCES: —

COMMENTARY

José Antonio Abad

This canon deals with the *days and times* of penance of *universal* character. Regarding the days, they are retained for all Fridays thus continuing a tradition that has not been interrupted since the apostolic era, according to the *Didaké* (the following canon will add Ash Wednesday); as far as the liturgical times are concerned, the time of Lent is also incorporated. As one could expect, it does not include the time of Advent, which, although it had a pronounced penitential character in some liturgies—such as the old Spanish one and the Gallican—the Roman Advent was never of such nature; it was rather characterized by the joyous expectation of the (first and last) coming of the Messiah.

The Roman Lent always had this penitential character because it was created to prepare—together with the catechumens that were to be baptized on the following Paschal Vigil—the "penitents" for reconciliation prior to the celebration of Easter. When the "Ordo Paenitentium" disappeared, Lent did not lose its penitential character, although it focused on the faithful, with the intention of preparing them to celebrate Easter through a serious, ascetic effort expressed, above all, through fasting and abstinence.

Sacrosanctum Concilium 109–110 ratified the traditional, penitential character of the Roman Lent, although it expanded its scope, since it indicated that "during Lent, penance should be not only internal and individual but also external and social" (*SC* 110); besides, the penitential practices of this time must be promoted "in ways suited to the present day, to different regions, and to individual circumstances" (ibid.). This interpretation was later incorporated into the *General Norms of the Liturgical Year* (no. 27).[1]

1. Cf. *Notitiae* 5 (1969), pp. 165–176.

1251 **Abstinentia a carnis comestione vel ab alio cibo iuxta conferentiae Episcoporum praescripta, servetur singulis anni sextis feriis, nisi cum aliquo die inter sollemnitates recensito occurrant; abstinentia vero et ieiunium, feria quarta Cinerum et feria sexta in Passione et Morte Domini Nostri Iesu Christi.**

Abstinence from meat, or from some other food as determined by the Bishops' Conference, is to be observed on all Fridays, unless a solemnity should fall on a Friday. Abstinence and fasting are to be observed on Ash Wednesday and Good Friday.

SOURCES: c. 1252; SCCouncil Decr. *Pia mater Ecclesia,* 29 ian. 1917 (*AAS* 9 [1917] 84); CodCom Resp., 17 feb. 1918 (*AAS* 10 [1918] 170), SCCouncil Decr. *Plures ex America,* 10 nov. 1919 (*AAS* 11 [1919] 462); SCPF Ind., 27 apr. 1920; CodCom Resp., 24 nov. 1918 (*AAS* 12 [1920] 576–577); SCCouncil Ind., 14 feb. 1922; SCCouncil Resp., 17 oct. 1923; SCCouncil Ind., 20 dec. 1940; SCEEA Ind., 19 dec. 1941 (*AAS* 33 [1941] 516–517); SCCouncil Ind., 22 ian. 1946 (*AAS* 38 [1946] 27); SC-Council Decr. *Cum adversa,* 28 ian. 1949 (*AAS* 41 [1949] 32–33), *SC* 110; *Paen* III, II §§ 2 et 3; III §§ 1 et 2; SCRit Normae, 21 mar. 1969, 20

CROSS REFERENCES: c. 1253

COMMENTARY

José Antonio Abad

This canon specifies the practices proper to *days* of penance, and distinguishes the following categories: *a*) Fridays in general, *b*) Fridays which coincide with solemnities, *c*) Good Friday, and *d*) Ash Wednesday.[1]

The general norm basically says that abstinence of meat or *any other food* specified by the bishops' conference must be observed *every Friday.* The mention of "other food" must be interpreted in the light of c. 1253 (see commentary), where the gamut of options is wider.

1. Here one recalls the ruling by the Ap. Const.of Paul VI *Paenitemini*, on February 12, 1966, in *AAS* 58 (1966), pp. 177–185, III, II, §§ 2 y 3. In 1967 the SCCouncil specified in an official reply that the obligation of observing days of penitence is grave considered in its entirety; so whoever omits a qualitatively or quantitatively significant part without excusable motive contravenes gravely; cf. *AAS* 59 (1967), p. 229.)

This norm does not affect Fridays that have a liturgical status of solemnity, no matter whether they are of obligation or not.

Good Friday receives a special treatment in accordance with the tradition preserved by *Sacrosanctum Concilium*, where it is said that it "must be kept sacred" and be "celebrated everywhere" (*SC* 110). This is why, besides abstaining from meat, the faithful must fast. Tertullian speaks about this fasting already, although in the African Church of which he is a witness, it had an eschatological character (they fasted because the Spouse was absent; the presence took place in the Eucharist of the paschal vigil, when the fast was broken). The penitential character comes later. Fasting has always been associated with abstinence. It may be appropriate here to warn that the penance of Good Friday is of a *paschal* character, since this day is not part of Lent but of the sacred triduum, and for this very reason it has a special importance. On this day, the Church accompanies and feels particularly united with the suffering Christ who is dying on the Cross for the sins of his sons and daughters.

The same discipline that applies to Good Friday applies to Ash Wednesday, since this is the day in which the Christian community begins the great Lenten journey. This is a traditional characteristic of the Roman Lent that was preserved even when the institution of "the penitents" disappeared.

The canon does not make any reference to Holy Saturday. Perhaps it might have been appropriate to incorporate the provision of the liturgical constitution in which it is keenly recommended because it is part of the "paschal fast" (*SC* 110); particularly, since the revised liturgical books and other documents of the magisterium do incorporate this provision.[2]

It is important to emphasize not only the ascetic but also the sacramental value of the different Fridays of the year, and of Good Friday, inasmuch as they are expressions of the following of Christ in the weekly and annual day consecrated to the memory of his passion.

2. *Misal Romano, Sábado Santo*; CDWDS, "Litterae circulares de Festis Paschalibus praeparandis et celebrandis," in *Notitiae* 24 (1988), pp. 81–107, no. 73.

1252 **Lege abstinentiae tenentur qui decimum quartum aetatis annum expleverint; lege vero ieiunii adstringuntur omnes aetate maiores usque ad annum inceptum sexagesimum. Curent tamen animarum pastores et parentes ut etiam ii qui, ratione minoris aetatis ad legem ieiunii et abstinentiae non tenentur, ad genuinum paenitentiae sensum informentur.**

The law of abstinence binds those who have completed their fourteenth year. The law of fasting binds those who have attained their majority, until the beginning of their sixtieth year. Pastors of souls and parents are to ensure that even those who by reason of their age are not bound by the law of fasting and abstinence, are taught the true meaning of penance.

SOURCES: c. 1254; CodCom Resp., 13 ian. 1918; *Paen* III, IV

CROSS REFERENCES: cc. 97 § 1, 203

COMMENTARY

José Antonio Abad

This canon deals mainly with the *subjects* who are bound to ecclesiastical penance, providing the age of fourteen years as the moment when the obligation of abstinence begins, and the age of eighteen (cf. c. 97 § 1) and fifty-nine (cf. c. 203), as the initial and final limits of the obligation to fast.

But it is also concerned with what we could call the *penitential pedagogy* of children and adolescents, since it encourages pastors and parents to form a spirit of penance in those that are not bound to abstinence and fasting due to their age. We believe that c. 1249 implies a determined orientation to this respect, since prayer, works of piety and charity, and the fulfillment of one's own duties are feasible at any age and in any situation, and they provide an opportunity to grow gradually in these virtues, emphasizing the redeeming value of any *small sacrifice* made for the love of Jesus Christ. On the other hand, the *education of the conscience* of the children and adolescents in all that has to do with the fulfillment of one's own duties, helping them to overcome stubbornness, laziness, and selfishness in loving imitation of Jesus Christ, is particularly relevant to Christian education.

1253 **Episcoporum conferentia potest pressius determinare observantiam ieiunii et abstinentiae, necnon alias formas paenitentiae, praesertim opera caritatis et exercitationes pietatis, ex toto vel ex parte pro abstinentia et ieiunio substituere.**

The Bishops' Conference can determine more particular ways in which fasting and abstinence are to be observed. In place of abstinence or fasting it can substitute, in whole or in part, other forms of penance, especially works of charity and exercises of piety.

SOURCES: SCPF Ind., 27 apr. 1920; SCCouncil Ind., 14 feb. 1922; SCCouncil Ind., 15 sep. 1931; SCCouncil Ind., 20 dec. 1940; SCCouncil Ind., 22 ian. 1946 (*AAS* 38 [1946] 27); *LG* 26 *Paen* III, VI

CROSS REFERENCES: cc. 1251, 1252

COMMENTARY

José Antonio Abad

The Constitution *Paenitemini* of February 17, 1966 granted bishops' conferences a wide margin of action when "reorganizing the penitential discipline with forms that are more appropriate to our time" and more adapted to "local customs," leaving it up to their discretion and pastoral care to determine the norms that they consider to be appropriate and efficient for each place, taking for granted that they have direct knowledge of the real situation of the faithful with whose care they have been entrusted (*Paen*, III, c). They could, to be more specific, transfer the days of penance when there was a just cause—with the time of Lent remaining unchanged—and completely or partly substitute abstinence and fasting by other forms of penance, especially by works of piety and charity (*Paen*, VI, 1, a and b), although they had to inform the Holy See of the norms provided in that respect (*Paen*, VI, 2).

Canon 1251 echoes this provisions and c. 1253 sanctions them substantially, since it entrusts bishops' conferences with the possibility of specifying or completely or partly substituting fasting and abstinence. Furthermore, there is an absolute concordance between the different substitutions, since the canon takes from the *Paenitemini* the expression "in all or in part for other forms of piety, particularly works of charity and practices of piety" (*Paen*, VI, 1, b and c).

Substituting fasting or abstinence with other forms of penance by the bishops' conferences is not a new possibility, or alternative, for the faithful, but it involves the obligation to observe the forms provided by particular law.[1] The latter, on the other hand, should take into account the greater spiritual good of the souls in order to be faithful to the spirit of the Church.

The Spanish Bishops' Conference, using the faculties that are granted to it by this canon, has provided as follows:

1) The traditional practice of the Fridays of the year, which consists of abstaining from meat, is preserved.

2) This penance can be substituted, in accordance to the free will of the faithful, by any of the following practices recommended by the Church: reading sacred scripture, alms (in the amount that each person determines in conscience), other works of charity (visiting the sick or distressed), works of piety (participation in the Holy Mass, praying the rosary, etc.), and corporal mortifications.

3) This substitution does not include Fridays during Lent.

4) The fast of Ash Wednesday and Good Friday—which consists in having just one meal a day—allows the faithful to eat some food in the morning and at night, following the legitimate usages where the quality and quantity of the food is concerned.[2]

There is no mention of the bull that was in force for some time in Spain, because the Apostolic Constitution *Paenitemini* abrogated all the general and particular privileges and indults; whereas, the usage has been preserved where fasting is concerned.

It is obvious that Spanish particular law is informed by the general indications of the frame-canon (c. 1249) and of the Apostolic Constitution *Paenitemini*, so, in this sense, it has been faithful to the spirit and the letter of universal law. This spirit can also be noticed in the *substitutions*. For instance, the reading of sacred scripture, both the Old and the New Testaments, is mentioned in the first place, which puts in practice the desire of Vatican II to promote a love for sacred scripture (cf. *SC* 24; *DV* 25 and *passim*), a love that the Christian people in Spain are particularly in need of. It also incorporates the classic triad (alms-prayer-mortification); one of the works of charity mentioned is visiting the sick, a practice that is particularly popular in our tradition; finally, it also mentions saying the holy rosary, a practice that has been well spread among us until recent times, but that is at risk of being lost.

1. *Comm.* 12 (1980), p. 367.
2. CBS, "Decreto (primero) general de la Conferencia Episcopal Española sobre las normas complementarias al nuevo Código de Derecho Canónico," art. 13, 2, in *BOCEE* 1 (1984) 103, and in *Ecclesia* no. 2183, July 21, 1984, 15 (895).